Supreme Court of the United States

OCTOBER TERM, 1954

No. 251

ROBERT SIMMONS,

Petitioner

v.

UNITED STATES OF AMERICA,

Respondent

ON PETITION FOR WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE SEVENTH CIRCUIT

BRIEF FOR PETITIONER

HAYDEN C. COVINGTON
124 Columbia Heights
Brooklyn 1, New York

Counsel for Petitioner

SUBJECT INDEX

CASES CITED

Statutes Cited

Selective Service Material Cited

Miscellaneous Citations

Supreme Court of the United States

OCTOBER TERM, 1954

No. 251

ROBERT SIMMONS,

Petitioner

v.

UNITED STATES OF AMERICA,

Respondent

ON PETITION FOR WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE SEVENTH CIRCUIT

BRIEF FOR PETITIONER

OPINION BELOW

The opinion of the Court of Appeals is reported. (213 F. 2d 901) It also appears in the record. [R. 77-92] No opinion was written by the district court. The opinion by the Court of Appeals in the companion case of *United States* v. *Sicurella,* referred to in the opinion in this case by the Court of Appeals, appears in the record in that case at page 110. It is an appendix to the petition in that case also.

JURISDICTION

The judgment of the Court of Appeals was entered on June 15, 1954. The time for filing this petition for writ of certiorari was extended to August 14, 1954. The petition for writ of certiorari was filed within the extended time. The jurisdiction of this Court is invoked under 28 U. S. C. § 1254(1). See also Rules 37(b)(2) and 45(a), Federal Rules of Criminal Procedure. Title 18, Section 3231, United States Code, confers jurisdiction on the trial court.

STATUTES AND REGULATIONS INVOLVED

Section 1(c) of the Universal Military Training and Service Act (50 U. S. C. App. § 451 (c))provides:

"The Congress further declares that in a free society the obligations and privileges of serving in the armed forces and the reserve components thereof should be shared generally, in accordance with a system of selection which is fair and just, and which is consistent with the maintenance of an effective national economy."—June 24, 1948, ch. 625, title I, § 1, 62 Stat. 604, amended June 19, 1951, ch. 144, title I, § 1(a) 65 Stat. 75.

Section 6(j) of the act (50 U. S. C. App. § 456(j), 65 Stat. 75, 83, 86) provides:

"Nothing contained in this title shall be construed to require any person to be subject to combatant training and service in the armed forces of the United States who, by reason of religious training and belief, is conscientiously opposed to participation in war in any form. Religious training and belief in this connection means an individual's belief in a relation to a Supreme Being involving duties superior to those arising from any human relation, but does not include essentially political, sociological, or philosophical views or a merely personal moral code. Any person claiming exemption from combatant training and service because of such conscientious objections whose claim is sustained by the local board shall, if he is inducted into the

armed forces under this title, be assigned to noncombatant service as defined by the President, or shall, if he is found to be conscientiously opposed to participation in such noncombatant service, in lieu of such induction, be ordered by his local board, subject to such regulations as the President may prescribe, to perform for a period equal to the period prescribed in section 4(b) such civilian work contributing to the maintenance of the national health, safety, or interest as the local board may deem appropriate and any such person who knowingly fails or neglects to obey any such order from his local board shall be deemed, for the purposes of section 12 of this title, to have knowingly failed or neglected to perform a duty required of him under this title. Any person claiming exemption from combatant training and service because of such conscientious objections shall, if such claim is not sustained by the local board, be entitled to an appeal to the appropriate appeal board. Upon the filing of such appeal, the appeal board shall refer any such claim to the Department of Justice for inquiry and hearing. The Department of Justice, after appropriate inquiry, shall hold a hearing with respect to the character and good faith of the objections of the person concerned, and such person shall be notified of the time and place of such hearing. The Department of Justice shall, after such hearing, if the objections are found to be sustained, recommend to the appeal board that (1) if the objector is inducted into the armed forces under this title, he shall be assigned to noncombatant service as defined by the President, or (2) if the objector is found to be conscientiously opposed to participation in such noncombatant service, he shall in lieu of such induction be ordered by his local board, subject to such regulations as the President may prescribe, to perform for a period equal to the period prescribed in section 4(b) such civilian work contributing to the maintenance of the national health, safety, or interest as the local board may deem appropriate and any such person who knowingly fails or

neglects to obey any such order from his local board shall be deemed, for the purposes of section 12 of this title, to have knowingly failed or neglected to perform a duty required of him under this title. If after such hearing the Department of Justice finds that his objections are not sustained, it shall recommend to the appeal board that such objections be not sustained. The appeal board shall, in making its decision, give consideration to, but shall not be bound to follow, the recommendation of the Department of Justice together with the record on appeal from the local board. Each person whose claim for exemption from combatant training and service because of conscientious objections is sustained shall be listed by the local board on a register of conscientious objectors."—50 U. S. C. App. § 456(j), 65 Stat. 75, 83, 86.

Section 1622.14 of the Selective Service Regulations (32 C. F. R. § 1622.14 (amended by E. O. 10420, 17 F. R. 11593, Dec. 19, 1952)) provides:

Class I-O: Conscientious objector available for civilian work contributing to the maintenance of the national health, safety, or interest.—(a) In Class I-O shall be placed every registrant who would have been classified in Class I-A but for the fact that he has been found, by reason of religious training and belief, to be conscientiously opposed to participation in war in any form and to be conscientiously opposed to participation in both combatant and noncombatant training and service in the armed forces."

Section 1625.2 of the Selective Service Regulations (32 C. F. R. § 1625.2 (E. O. 10292, 16 F. R. 9862, Sept. 28, 1951)) provides:

"When registrant's classification may be reopened and considered anew.—The local board may reopen and consider anew the classification of a registrant (1) upon the written request of the registrant, the government appeal agent, any person who claims to be a dependent of the registrant, or any person who has on file a written request for the

current deferment of the registrant in a case involving occupational deferment, if such request is accompanied by written information presenting facts not considered when the registrant was classified, which, if true, would justify a change in the registrant's classification; or (2) upon its own motion if such action is based upon facts not considered when the registrant was classified which, if true, would justify a change in the registrant's classification; *provided*, in either event, the classification of a registrant shall not be reopened after the local board has mailed to such registrant an Order to Report for Induction (SSS Form No. 252), unless the local board first specifically finds there has been a change in the registrant's status resulting from circumstances over which the registrant had no control."

Section 1626.25 of the Selective Service Regulations (32 C. F. R. § 1626.25 (E. O. 10363, 17 F. R. 5456, June 18, 1952)) provides:

"*Special provisions when appeal involves claim that registrant is a conscientious objector.*—(a) If an appeal involves the question whether or not a registrant is entitled to be sustained in his claim that he is a conscientious objector, the appeal board shall take the following action:

"(1) If the registrant has claimed, by reason of religious training and belief, to be conscientiously opposed to participation in war in any form and by virtue thereof to be conscientiously opposed to combatant training and service in the armed forces, but not conscientiously opposed to noncombatant training and service in the armed forces, and the local board has classified the registrant in Class I-A-O, the appeal board shall proceed with the classification of the registrant. If, in such a case, the local board has classified the registrant in any class other than Class I-A-O, the appeal board shall transmit the entire file to the United States Attorney for the Federal judicial district in which the appeal board has jurisdiction for the purpose of

securing an advisory recommendation from the Department of Justice.

"(2) If the registrant has claimed by reason of religious training and belief, to be conscientiously opposed to participation in war in any form and by virtue thereof to be conscientiously opposed to participation in both combatant and noncombatant training and service in the armed forces, and the local board has classified the registrant in Class I-O, the appeal board shall proceed with the classification of the registrant. If, in such a case, the local board has classified the registrant in any class other than Class I-O, the appeal board shall transmit the entire file to the United States Attorney for the Federal judicial district in which the appeal board has jurisdiction for the purpose of securing an advisory recommendation from the Department of Justice.

"(b) Whenever a registrant's file is forwarded to the United States Attorney in accordance with paragraph (a) of this section, the Department of Justice shall thereupon make an inquiry and hold a hearing on the character and good faith of the conscientious objections of the registrant. The registrant shall be notified of the time and place of such hearing and shall have an opportunity to be heard. If the objections of the registrant are found to be sustained, the Department of Justice shall recommend to the appeal board (1) that if the registrant is inducted into the armed forces, he shall be assigned to noncombatant service, or (2) that if the registrant is found to be conscientiously opposed to participation in such noncombatant service, he shall in lieu of induction be ordered by his local board to perform for a period of twenty-four consecutive months civilian work contributing to the maintenance of the national health, safety, or interest. If the Department of Justice finds that the objections of the registrant are not sustained, it shall recommend to the appeal board that such objections be not sustained.

"(c) Upon receipt of the report of the Department of Justice, the appeal board shall determine the classification of the registrant, and in its determination it shall give consideration to, but it shall not be bound to follow, the recommendation of the Department of Justice. The appeal board shall place in the Cover Sheet (SSS Form No. 101) of the registrant the letter containing the recommendation of the Department of Justice."

Section 1626.26 of the Selective Service Regulations (32 C. F. R. § 1626.26 (1951 Rev.)) provides:

"*Decision of appeal board.*—(a) The appeal board shall classify the registrant, giving consideration to the various classes in the same manner in which the local board gives consideration thereto when it classifies a registrant, except that an appeal board may not place a registrant in Class IV-F because of physical or mental disability unless the registrant has been found by the local board or the armed forces to be disqualified for any military service because of physical or mental disability.

"(b) Such classification of the registrant shall be final, except where an appeal to the President is taken; *provided,* that this shall not be construed as prohibiting a local board from changing the classification of a registrant in a proper case under the provisions of part 1625 of this chapter."

QUESTIONS PRESENTED

I.

Whether the denial by the appeal board of the claim for classification of petitioner as a conscientious objector was without basis in fact and, consequently, the final I-A classification was arbitrary and capricious.

II.

Whether the act and the regulations permit the Department of Justice to recommend to the appeal board to deny and whether the appeal board may deny the con-

scientious objector status because the petitioner, an objector to direct participation in the armed forces, is a recent convert to Jehovah's Witnesses.

III.

Whether the petitioner was denied procedural due process of law upon the Department of Justice hearing when the hearing officer asked general questions, evaded the request of the petitioner for adverse information and failed to give petitioner a full and fair summary of the adverse information appearing in the secret investigative report relied upon by the Department of Justice in making its recommendation to the appeal board.

IV.

Whether the district court erred when it quashed the subpoena *duces tecum* commanding the production of the FBI report and denied the petitioner the right to use it at his trial to determine if the hearing officer had failed to give the petitioner a full and fair summary of the unfavorable evidence in the secret FBI investigative report.

STATEMENT OF THE CASE

This criminal action was brought by indictment charging petitioner with a violation of the Universal Military Training and Service Act (50 U. S. C. App. §§ 451-470). Petitioner was charged with failing and refusing to submit to induction, contrary to the act. The indictment was filed on March 12, 1953. [R.1, 2, 4-5] The district court took jurisdiction under 18 U. S. C. § 3231. On May 19, 1953, the petitioner pleaded not guilty. [R. 1, 2]

Petitioner caused to be issued and served upon the United States Attorney and the agent in charge of the Chicago Office of the Federal Bureau of Investigation a subpoena *duces tecum*. [R. 2, 5-6] On the call of the case for trial September 18, 1953, the Government moved to quash

the subpoena *duces tecum*. [R. 3] The petitioner filed an affidavit in opposition to the motion to quash the subpoena *duces tecum*. In the affidavit petitioner stated that he needed the FBI report produced so that it could be determined whether the hearing officer of the Department of Justice gave him the required full and fair summary of the unfavorable evidence appearing in the FBI report as required by law. Petitioner said that if the production of the FBI report was not compelled he would be prejudiced. [R. 6-9] The court ordered the supoena *duces tecum* quashed. [R. 3, 9-10]

The case proceeded to trial before the judge without a jury, which was waived. [R. 1, 2, 15] At the close of all the evidence petitioner made his motion for judgment of acquittal. [R. 3, 10-14] The motion for judgment of acquittal was denied. [R. 3] On September 18, 1953, the trial court found the petitioner guilty and entered a judgment and commitment sentencing petitioner to the custody of the Attorney General for two years. [R. 3, 14-15]

On September 28, 1953, a notice of appeal to the Court of Appeals was filed. [R. 60, 74] The time for filing the record in the Court of Appeals was duly extended and the statement of points was duly filed as required by the rules of the court. [R. 75] The court below affirmed. [R. 115]

Simmons was born on April 8, 1927. [R. 39] He registered with his local board on September 10, 1948. [R. 40] A classification questionnaire was mailed to him on December 6, 1948. [R. 41] He filled out the questionnaire, giving his name and address. [R. 42] At the time he filed his questionnaire he was not one of Jehovah's Witnesses. He did not answer that he was a minister of religion. [R. 43]

He showed that he was a chauffeur for the Civil Service Commission. [R. 43] He worked 40 hours per week at his job. [R. 43] At the time he filed his questionnaire he was

not a conscientious objector; therefore he failed to sign Series XIV. [R. 44] He explained in his testimony why he did not sign the conscientious objector blank in the questionnaire. [R. 25-26]

Not having any grounds for deferment he claimed in his classification questionnaire that he was entitled to classification I-A. [R. 26, 44]

On December 23, 1948, the local board placed him in Class I-A. [R. 45] He was not called for induction during this period, because there was no induction. On June 4, 1951, Simmons was placed in the deferred classification of a married man, Class III-A. [R. 45] He remained in this classification until October 22, 1951, when he was placed in Class I-A again and notified of it. [R. 45]

Simmons requested that he be provided with a special form for conscientious objector. This was mailed to him on October 25, 1951. [R. 46] On October 30 he was ordered to report for a preinduction physical examination on November 15, 1951. [R. 70]

On October 30, 1951, Simmons filed with his local board his conscientious objector form. [R. 46] He signed Series I(B), showing that he was opposed to both combatant and noncombatant military service. [R. 46] He answered that he believed in the Supreme Being. [R. 47] He stated the nature of his belief. He showed that he relied upon the Scriptural commands of Jehovah God to remain unspotted from the world. He showed that he must obey God rather than man. He then answered that the nations and the armies of the present evil world were under the lordship of Satan the Devil. He stated that he must obey the commandment of God and remain unspotted and, also, that he could not violate the commandments of God that prohibit killing. [R. 47]

Simmons showed that he got his conscientious objections as the result of a Bible study with Jehovah's Witnesses that began in November, 1949. He showed that he progressed in this study under the direction of Clarence

Houze, a minister of Jehovah's Witnesses. He answered that he had received his religious training from Houze under the direction of the Watchtower Bible and Tract Society, legal governing body of Jehovah's Witnesses. [R. 47]

In the conscientious objector form Simmons also answered that he did not believe in the use of force at all unless it "be under the supervision of Jehovah God." [R. 47] He certified that the thing that consistently demonstrated the depth of his conviction was his course of study and his activity as a minister. He emphasized that this should demonstrate the depth of his convictions. [R. 47-48] He stated that he had given public expression to his belief. [R. 48]

He then listed the schools that he had attended, his employers and his places of residence. [R. 48-49]

Simmons showed that his father had no religion and that his mother was a Baptist. [R. 49] He said that he had never been a member of any military organization. [R. 49] He showed that he was a member of Jehovah's Witnesses, and that the legal governing body of that organization was the Watchtower Bible and Tract Society. He showed that he had become a member of Jehovah's Witnesses in the middle of November, 1949. He gave the address of the church that he attended and the name of the presiding minister. [R. 49-50] He stated that Jehovah's Witnesses had a belief of being conscientiously opposed to combatant and noncombatant service. He answered that he was not a member of any other organization. [R. 50]

Simmons testified that he was claiming to be both a minister and a conscientious objector at the time he filed the form. He said that he tried to use the form also in an effort to get a minister's classification. [R. 28, 29] The local board, after the conscientious objector form was filed on November 26, 1951, classified Simmons in I-A. It denied the minister's claim as well as the conscientious objector status. [R. 45]

The local board sent the file to the appeal board. [R. 41] The appeal board made a predetermination that the registrant should be denied the conscientious objector status. It forwarded his file to the Department of Justice for appropriate inquiry and hearing. [R. 45] Thereafter there was an extensive investigation by the Federal Bureau of Investigation. This was followed by a hearing before the Department of Justice hearing officer. [R 19, 53]

Upon the hearing there was no extensive inquiry or discussion as to the conscientious objections of Simmons. The hearing officer merely asked a few brief questions. He then told Simmons that he had the FBI secret investigative report. He informed Simmons that the report stated that he had been hanging around pool halls and that was about all the report said. The hearing officer then asked Simmons if he still did that at the time of the hearing. Simmons replied that he did not. Simmons said that he then asked the hearing officer, "What else was in the report?" He said that West, the hearing officer, did not answer the question directly but began to talk about the time when he was associated with a large law firm in Chicago. He then told Simmons that he knew all the justices of the Supreme Court of the United States. [R. 19]

West then asked the wife of Simmons, who was present at the hearing, how Simmons was treating her. Simmons testified that his wife said "fine." West, the hearing officer, then told Simmons that he was going to make a recommendation to Washington in favor of his ministerial claim. [R. 19] West, the hearing officer, did not inform Simmons of the other adverse evidence against his conscientious objector status appearing in the file. [R. 19, 52-55]

Following a consideration of the report of the hearing officer to the Department of Justice a recommendation was made by the Assistant Attorney General. This was sent to the appeal board. The recommendation was that Simmons be denied his conscientious objector claim. The recommen-

dation found that Simmons believes in the Supreme Being. [R. 53] It found that according to the investigative report Simmons had been reading the Bible during lunch hour and discussing his belief with his fellow workers. One informant who knew about Simmons' former life stated that he had changed and he believed "registrant is now sincere." [R. 53-54]

The recommendation of the Department of Justice relies upon unfavorable and adverse evidence that was not called to the attention of Simmons upon the occasion of his personal appearance. Emphasis is placed upon the police record of Simmons, involving trouble with his wife and claims of his abusing her. [R. 54] The recommendation of the Department of Justice is also grounded on the conclusion of the hearing officer in his report that Simmons' religious activities were simultaneous with his draft liability. The Department of Justice concluded that he had less than two years' religious training with Jehovah's Witnesses. The Assistant Attorney General, T. Oscar Smith, said that because of this his sincerity was questionable. The Assistant Attorney General recommended against the claim of Simmons for classification as a conscientious objector. [R. 52, 55]

The appeal board classified Simmons in Class I-A. [R. 19, 41] He was notified of this. [R. 41]

He was ordered to report for induction. The order issued on January 6, 1953. He was commanded to report on February 9, 1953. [R. 46, 55-56, 72-73]

On January 16, 1953, after Simmons was ordered to report for induction he discovered that his wife, who had been in the hospital for some time, had become seriously ill and incapacitated to such an extent that he had a dependent and a hardship case that entitled him to deferment and reclassification in Class III-A. [R. 34]

On January 20, 1953, he filed a doctor's affidavit as to the seriousness of his wife's condition, which made her de-

pendency upon him a hardship case. [R. 20, 63] Simmons then requested the local board to reopen his case and to reclassify him in III-A, temporarily pending the continued hardship and absolute dependency of his wife. [R. 20] Simmons explained that his wife had an operation because of an infected gland and also that she had eight ribs removed, making her a total dependent. The affidavit showed that she was confined to bed with tuberculosis. [R. 20, 21]

The local board members stated that they would consider the affidavit of dependency and change of condition. [R. 21] Simmons returned to the local board on February 2, 1953, several days before he was ordered to report for induction, to find out about what the board had done concerning his request for a reopening of his classification. The board members said: "We are not going to consider that." Simmons asked what was going to happen to him because of his wife's serious condition. The board members said: "That is your business. This is no concern of ours." [R. 22]

Simmons wrote a letter to the Director of Selective Service. This was forwarded to the local board for a consideration of the dependency status. [R. 22-23, 59-60] The local board did not reconsider the change in status and the hardship dependency claim of Simmons although the evidence showed that the new and changed condition had come about due to circumstances that were entirely beyond his control.

Simmons reported to his local board for forwarding to the induction station on January 19. At the induction station his examination was not completed. He was examined several times during the next several days. Finally his examination was completed on February 9, 1953. He was ordered to submit to induction on that date. He refused to submit, for which he was prosecuted. [R. 46, 55-56, 72-73]

The papers filed showed that Simmons was a bona fide conscientious objector to both combatant and noncombatant military service. [R. 25-26, 46-50, 52-55] The appeal board classified Simmons I-A. In the motion for judgment of acquittal he contended that the denial of the conscientious objector status was without basis in fact. [R. 11] The motion was denied. [R. 3, 14-15] The court below held that there was basis in fact for the denial of the conscientious objector status. [R. 83-85, 92]

There was a hearing in the Department of Justice. This was followed by a report and recommendation to the appeal board. [R. 52-55] The Department of Justice recommended that the conscientious objector status be denied. The basis of the recommendation was that the petitioner became a conscientious objector too late and such late-coming was basis in fact for the denial thereof. [R. 52-55] The Court of Appeals held that this was proper basis for the denial of the conscientious objector status. [R. 83-84]

Petitioner had a hearing in the Department of Justice before the hearing officer. He requested to be supplied with unfavorable evidence appearing in the FBI report. [R. 19] The hearing officer did not inform petitioner of all the adverse evidence relied upon by him as a basis for the adverse recommendation. [R. 19, 52-55] The recommendation of the Department of Justice was that the conscientious objector claim be denied. [R. 52-55] The appeal board followed the recommendation. [R. 19, 41] The court below held this was no violation of the rights of petitioner. [R. 85]

Upon the trial petitioner subpoenaed the production of the secret FBI investigative report. [R. 5-6] The Government made a motion to quash the subpoena. [R. 3] An affidavit was filed in opposition to the motion. [R. 6-9] The court quashed the subpoena *duces tecum*. [R. 9-10] The court below held that this was not reversible error. [R. 85-91]

SUMMARY OF ARGUMENT

ONE

The denial of the conscientious objector status and the final classification of I-A by the appeal board were without basis in fact, arbitrary and capricious.

Petitioner showed in the draft board file without dispute that he opposed participation in noncombatant and combatant military service. His papers established that this objection was based on belief in the Supreme Being. He showed that he was one of Jehovah's Witnesses and had received religious training and belief from Jehovah's Witnesses, supporting his conscientious objections. His opposition to the performance of military service was not based on political, sociological or philosophical views or a personal moral code. He brought himself squarely within the definition of a conscientious objector appearing in the act.

No one in the Selective Service System or the Department of Justice questioned his good faith or contradicted the documentary proof submitted by him. The report of the hearing officer and the recommendation of the Department of Justice were not based upon any disbelief of the statements made by petitioner. They recommended against the conscientious objector claim because petitioner was a late-comer to Jehovah's Witnesses and acquired his conscientious objections too late to be considered based upon religious training and belief.

The petitioner discharged his burden before the draft board when he showed by the undisputed evidence that he was a conscientious objector. The law did not put a greater burden upon him and require him to "convince the members" of the board. The members of the board were impossible to be convinced, irrespective of the undisputed evidence. This makes necessary judicial review and a finding of no basis in fact.

There was no weighing of the evidence. The reason is that there was no conflict in the evidence on the conscientious objector claim. By answering the questions, filling out the form properly and supporting it by proper papers petitioner discharged his burden of proof. The burden then shifted to the Government to contradict the statements appearing in his draft board file. The papers that he signed and filed were not mere claims. They were evidence. Petitioner could be prosecuted for falsely answering the questions. These statements made under the pain of liability for false swearing were not contradicted by the Government. Petitioner discharged his burden. The Government failed to meet its burden by rebutting the undisputed proof submitted by petitioner. The rule of *Dickinson* v. *United States,* 346 U. S. 389 (1953), applies. (*Pine* v. *United States,* 4th Cir., 1954, 212 F. 2d 93, 96; *Weaver* v. *United States,* 8th Cir., 1954, 210 F. 2d 815, 822-823; *Jessen* v. *United States,* 10th Cir., 1954, 212 F. 2d 897, 900; *United States* v. *Hartman,* 2d Cir., 1954, 209 F. 2d 366, 368, 369-370; *United States* v. *Pekarski,* 2d Cir., 1953, 207 F. 2d 930; *United States* v. *Wilson,* 7th Cir., 1954, 215 F. 2d 443, 446) That the *Dickinson* case, *supra,* dealt with the ministerial status and not the conscientious objector claim makes no difference.

The act makes no distinction between the quantum of proof made to support the conscientious objector claim and the ministerial claim. The only difference between the two is the extensive FBI investigation and the recommendation by the Department of Justice. Unless the Department of Justice turns up some contradictory evidence the situation is the same. Congress did not intend to put a greater burden of proof upon the conscientious objector than any other claimant of classification. In the condition of the record in this case with no contradictory evidence the rule of *Dickinson* v. *United States, supra,* applies.

There is no judging of the credibility of petitioner. At no time did any member of the Selective Service System or the Department of Justice accuse him of lying. No memorandum of lack of credibility was made in the draft board files. It cannot be assumed or speculated that the draft board judged his credibility. The appeal board did not have an opportunity to interview him. The Department of Justice did not say that he was lying. It requires the wildest sort of speculation to say that he was found to be unbelievable.

The conscientious objector claim does not involve probing a man's conscience and is not a speculative venture. It is susceptible of exact proof, the same as any other claim. The word "conscientiously" merely means that one has taken the stand of opposition to war sincerely. "Sincerely" means that he is not a hypocrite and is not lying in his claim. The Government does not claim that Simmons was a hypocrite or that he lied in making his claim. It must be assumed, therefore, that he is sincere. The recommendation of the Department of Justice, that petitioner was a latecomer and had not had sufficient religious training, was not enough to contradict the undisputed evidence that he was a conscientious objector.

Permission of judicial review and the application of the doctrine of no basis in fact (*Estep* v. *United States*, 327 U. S. 114 (1946); *Dickinson* v. *United States*, 346 346 U. S. 389 (1953)) in conscientious objector cases, the same as in other prosecutions, will not result in a mass conversion of males for the purpose of draft evasion. The facts in the records of the various religious organizations prove to the contrary. This could be said of all exemptions that are provided for in the act. This type of argument could be made against the court's applying a no basis in fact rule for any exemption or deferment provided for by law. Rather than stretch the "no basis in fact" rule so as to prevent judicial review the remedy to prevent evasion of

the law is to prosecute for making false statements. The act provides for prosecution for false statements made by registrants. The failure of the Government to accuse Simmons of making false statements should be taken as a confession by the Government that there is no untrue statement made by Simmons in the draft board file. Assuming that he has made no untrue statements, then it must be assumed that the record in his case indisputably establishes his conscientious objections. The burden was upon the Selective Service System to rebut his statements. Having failed to do this the Government cannot contend that there is basis in fact. This is especially true when the only factual basis relied upon by the Government is the fact that Simmons was a late-comer to the religion of Jehovah's Witnesses and took on his conscientious objections after he was classified.

The report of the Department of Justice, referring to the secret FBI investigative report about Simmons' previously having been a heavy drinker and gambler, is irrelevant and immaterial. To begin with, the report antedated by a long time the date when he became a conscientious objector. There is nothing in it to prove that at the time of his classification these statements applied against him. The reference to the abuse and physical violence toward his wife is questioned. The FBI report on its face does not constitute sufficient evidence to contradict what Simmons said in his file. (See *Annett* v. *United States*, 10th Cir., 1953, 205 F. 2d 689.) This should not be relied upon as basis in fact, especially in view of the circumstance that the hearing officer did not give Simmons an opportunity to reply to it when he was before the Department for a hearing on his conscientious objections.

There was, therefore, a denial of the conscientious objector status without basis in fact.

TWO

Petitioner was denied a full and fair hearing upon his personal appearance before the hearing officer in the Department of Justice when that officer failed and refused to give to petitioner a full and fair summary of the unfavorable evidence in the secret FBI investigative report used by the hearing officer and the Assistant Attorney General in the making of their recommendation under the act.

When petitioner had his hearing in the Department of Justice the hearing officer referred to only one part of the FBI report. It was that petitioner had hung around pool halls. No reference was made to the other adverse evidence. The hearing officer relied on other adverse evidence in his report. Petitioner asked the hearing officer if there was any other adverse evidence. The hearing officer did not answer his request. This was evaded by a statement that the hearing officer knew all the members of the Supreme Court of the United States. The report of the hearing officer was adverse.

It was unnecessary for Simmons to request a "summary" of the FBI report. He did enough when he asked for the unfavorable evidence. The hearing officer referred to some of the evidence but not all. Obviously he considered the request to be sufficient. The request was in accordance with the procedure then employed by the Department of Justice to provide only the general nature of the unfavorable evidence when requested.

It was held in *United States* v. *Nugent*, 346 U. S. 1, 6 (1953), that the law is complied with when the hearing officer supplies the registrant on request "with a fair résumé of any adverse evidence in the investigator's report." Petitioner requested additional unfavorable evidence. There was additional evidence relied upon by the hearing officer. He relied upon the mistreatment of petitioner's wife by petitioner as a basis for the adverse recommendation. Petitioner called for any more adverse evidence. The hearing

officer did not supply this piece of evidence. This was a deprivation of procedural due process of law.—*United States* v. *Bouziden*, W. D. Okla., 1952, 108 F. Supp. 395, 398; *Eagles* v. *Samuels*, 329 U. S. 304, 312-314 (1946); *DeGraw* v. *Toon*, 2d Cir., 1945, 151 F. 2d 778; *Levy* v. *Cain*, 2d Cir., 1945, 149 F. 2d 338; *United States* v. *Balogh*, 2d Cir., 1946, 157 F. 2d 939; *Chen Hoy Quong* v. *White*, 9th Cir., 1918, 249 F. 869, 870; *Bachus* v. *Owe Sam Goon*, 9th Cir., 1916, 235 F. 847, 853; *Chin Ah Yoke* v. *White*, 9th Cir., 1917, 244 F. 940, 942; *Mita* v. *Bonham*, 9th Cir., 1928, 25 F. 2d 11, 12; *Ohara* v. *Berkshire*, 9th Cir., 1935, 76 F. 2d 204, 207; *United States* v. *Gray*, 9th Cir., 1953, 207 F. 2d 237, 241-242; see also *Interstate Commerce Commission* v. *Louisville and Nashville Railroad Company*, 227 U. S. 88, 91-92 (1913); *Morgan* v. *United States*, 304 U. S. 1, 18, 19, 22 (1938); compare *United States* v. *Abilene & S. Ry. Co.*, 265 U. S. 274, 290 (1924).

Petitioner never had an opportunity to see the report of the hearing officer or the recommendation of the Department of Justice relying upon the unfavorable evidence until after the classification by the appeal board. This was entirely too late for him to be apprised of the unfavorable evidence relied upon. The hearing officer was obliged to give him a summary of this when he was at the hearing. This was his only opportunity to be apprised of the unfavorable evidence under the procedure followed by the Department. There he had an opportunity to answer it, but the hearing officer denied him the right.

The mere asking of the general question by the hearing officer did not constitute a full and fair summary of the unfavorable evidence. Asking of questions is not a summary. The questions asked did not even relate to the unfavorable evidence. The hearing officer was not called as a witness for the respondent. The failure of the hearing officer to be called to contradict the testimony of the petitioner gives rise to a presumption that what the petitioner said was true.

The case of *United States* v. *Nugent*, 346 U. S. 1 (1953), did not decide that the law did not require the providing of the summary. The Court, to the contrary, indicated that due process of law was satisfied when the hearing officer provided a full and fair summary of the unfavorable evidence. (346 U. S., p. 6) That holding is not *obiter dictum;* it was a declaration of the law made by this Court in answer to the proposition that the entire FBI report should have been produced at the hearing.

There would have been no litigious interruption of the process of drafting by giving the petitioner a summary of the unfavorable evidence. He could have answered the unfavorable evidence in a few minutes. It would not have required a long, drawn-out litigious hearing where witnesses are summoned and cross-examination allowed. All that he wanted to do was to answer the unfavorable evidence. It was the responsibility of the hearing officer to give it to him. This was not done as it should have been under the *Nugent* case, *supra*, 346 U. S., page 6.

The Government was required to prove a *prima facie* case. As the petitioner was permitted to show that there were irregularities procedurally in the process of induction the petitioner met the burden placed upon him by showing that the hearing officer did not give a full and fair summary. The proceedings in the Department of Justice became a link in the chain of proceedings. The invalidity of the Department of Justice proceedings by failure to give a summary makes the entire proceedings void.—*Hinkle* v. *United States*, 9th Cir., Sept. 24, 1954. — F. 2d — ; *Clementino* v. *United States*, 9th Cir., Sept. 27, 1954, — F. 2d — ; *United States* v. *Everngam*, D. W. Va., 1951, 102 F. Supp. 128; *United States* v. *Bouziden*, W. D. Okla., 1952, 108 F. Supp. 395, 398.

The Department of Justice has since the *Nugent* opinion followed the procedure of making a full and complete summary of all the unfavorable evidence appearing in the

FBI report and mailing it to the registrants. This practice by the Department evidences an interpretation of the *Nugent* opinion that a full and fair summary of all the unfavorable evidence appearing in the FBI report is necessary. The position of the Department of Justice in this case is inconsistent with that taken under the general practice fixed since the decision in the *Nugent* case.

The failure to give a full and fair résumé of the unfavorable evidence invalidated the draft board proceedings so as to require an acquittal in this case.

THREE

The district court committed reversible error when it quashed the subpoena *duces tecum* calling for the production of the secret FBI investigative report and prevented the use of the report at the trial for the purpose of determining whether the hearing officer had given a full and fair summary of the adverse evidence appearing in the secret FBI investigative report.

Petitioner subpoenaed the secret FBI investigative report at the trial. A motion to quash was sustained. Petitioner was denied the right to call for the FBI report at the trial for the purpose of showing its materiality and relevance.

The Court in *United States* v. *Nugent*, 346 U.S. 1, 6 (1953), stated that the proper procedure required the giving of a full and fair résumé of the unfavorable evidence. The trial court was required to determine whether a summary of the adverse evidence was needed to be given and, if given, was it adequately provided by the hearing officer. The trial court could not discharge its judicial function without seeing the FBI report. The report could not be seen without admitting it into evidence. The petitioner could not offer it into evidence without having the subpoena sustained.

The position taken by the petitioner on this point is

supported by *United States* v. *Edmiston*, D. Neb., 1954, 118 F. Supp. 238, 240; *United States* v. *Evans*, D. Conn., 1953, 115 F. Supp. 340, 343; *United States* v. *Stull*, No. 5634, Eastern District of Virginia, Richmond Div., Nov. 6, 1953; *United States* v. *Stasevic*, S. D. N. Y., 1953, 117 F. Supp. 371; *United States* v. *Parker*, No. 3651, District of Montana, Butte Div., Dec. 2, 1953; *United States* v. *Brussell*, No. 3650, District of Montana, Butte Div., Nov. 30, 1953; see also *United States* v. *Andolschek*, 2d Cir., 1944, 142 F. 2d 503, 506; *United States* v. *Krulewitch*, 2d Cir., 1944, 145 F. 2d 76, 78-79; read *United States* v. *Reynolds*, 345 U. S. 1, 12 (1953).

The order of the Department of Justice making the FBI report confidential (Department of Justice Order No. 3229 issued pursuant to 5 U. S. C. § 22) is waived by the Government when the FBI reports are used as a part of the administrative proceedings. The reports are used by the hearing officer and the Department of Justice in making its recommendation to the appeal board. The final recommendation is based upon the secret FBI investigative report. In the absence of a showing that a disclosure of the FBI report at the trial would endanger the national security it must be produced. No showing of danger to the national security can possibly be made in the case of a conscientious objector.

It is for the courts and not the Department of Justice to determine whether the FBI reports should be produced. —*Touhy* v. *Ragen*, 340 U. S. 462, 469, 472 (1951); *Bank Line* v. *United States*, 2d Cir., 1947, 163 F. 2d 133, 138, 139; *Zimmerman* v. *Poindexter*, D. Hawaii, 1947, 74 F. Supp. 933, 935; see the order of Attorney General Clark in Supplement No. 2, June 6, 1947, clarifying Order No. 3229, since repealed by an order dated January 13, 1953.

The order quashing the subpoena in advance of the trial cannot be sustained at the end of trial on the ground that there is basis in fact for the classification. Petitioner

was entitled to have a trial and a chance to test out whether the hearing officer gave him a full and fair summary when he was being prosecuted in the district court. For the judge to find that there was basis in fact for the conscientious objector status does not at all make harmless error the quashing of the subpoena.

There is no showing whatever in the record in this case that the hearing officer supplied petitioner with all the unfavorable evidence. This requires the court to conclude without seeing the FBI report that what the Department of Justice is telling the court is correct. It is up to this Court to say whether there is any unfavorable evidence in the FBI report. The only way this can be determined is by looking at the report and judging it with the testimony given by the petitioner as to what evidence was given him by the hearing officer. The Department of Justice was not required to make a statement in its recommendation to the appeal board of all the adverse evidence. It had the FBI report before it. There may have been an unlimited amount of evidence not mentioned in the report but which was actually relied upon in reaching the conclusion that the conscientious objector claim be denied.

It cannot be said that the FBI report was irrelevant and immaterial to the issue. It should be remembered that the court below quashed the subpoena. Neither the trial court nor petitioner's counsel had an opportunity to examine the FBI report. It could not be called for. Since the issue here is the error of the court in quashing the subpoena rather than in excluding the FBI report called for in the subpoena, it must be conclusively assumed that the FBI report was relevant and highly material. The only problem here is whether the court erred in quashing the subpoena. The issue is not whether the FBI report is relevant and material. The question is whether the court had any justification for quashing the subpoena. None appeared in law or in fact. The court below was in error in affirming the

order quashing the subpoena and refusing to reverse and remand the case for new trial.

What this Court held in *Gordon* v. *United States*, 344 U. S. 414, 418-420 (1953), is applicable. There the Court held that it was unnecessary to say whether the evidence was material. The question was whether the court erroneously refused to compel the production of documentary evidence. Since the evidence was unknown to the court it was held that the court could not say whether it was material or immaterial. This Court said: "The question to be answered on an application for an order to produce is one of admissibility under traditional canons of evidence, and not whether exclusion might be overlooked as harmless error."—344 U. S., at p. 420.

The district court committed reversible error when it quashed the subpoena *duces tecum* calling for the production of the secret FBI investigative report. No legal or justifiable basis exists for the trial court's ruling or the action of the court below in affirming the order quashing the subpoena.

FOUR

In the event this Court concludes that the order sustaining the motion to quash in this case is proper and no error was committed, then petitioner requests this Court to reconsider and reverse its ruling in *United States* v. *Nugent*, 346 U. S. 1 (1953).

ARGUMENT

ONE

The denial of the conscientious objector status and the final classification of I-A by the appeal board were without basis in fact, arbitrary and capricious.

The documentary evidence submitted by the petitioner establishes that he had sincere and deep-seated conscientious objections against combatant and noncombatant mili-

tary service that were based on his "relation to a Supreme Being involving duties superior to those arising from any human relation." This material also showed that his belief was not based on "political, sociological, or philosophical views or a merely personal code," but that it was based upon his religious training and belief as one of Jehovah's Witnesses, being deep-seated enough to drive him to enter into a covenant with Jehovah and dedicate his life to the ministry. [R. 46-50, 53-55]

There is no question whatever on the veracity of the petitioner. The local board and the appeal board accepted his testimony. Neither the local board nor the appeal board raised any question as to his veracity. They merely misinterpreted the evidence. The question is not one of fact but is one of law. The law and the facts irrefutably establish that petitioner is a conscientious objector opposed to combatant and noncombatant service.

In view of the fact that there is no contradictory evidence in the file, disputing petitioner's statements as to his conscientious objections and there is no question of veracity presented, the problem to be determined here by this Court is one of law rather than one of fact. The question to be determined is: Was the holding by the appeal board (that the undisputed evidence did not prove petitioner was a conscientious objector opposed to both combatant and noncombatant service) arbitrary, capricious and without basis in fact?

There is absolutely no evidence whatever in the draft board file that petitioner was willing to do military service. All his papers and every document supplied by him staunchly presented the contention that he was conscientiously opposed to participation in both combatant and noncombatant military service. The appeal board, without any justification whatever, held that he was willing to perform military service. The petitioner did not suggest or even imply that he was willing to perform any military

service. He contended that he was unwilling to go into the armed forces and do anything as a part of military machinery.

No one questioned the good faith of petitioner in becoming one of Jehovah's Witnesses. His good faith in becoming one of Jehovah's Witnesses is not disputed in the evidence. There is absolutely no evidence whatever that he fictitiously or fraudulently assumed the robe of conscientious objection believed by Jehovah's Witnesses for the purpose of evading military service. The conscientious objector form and the evidence completely corroborated his bona fide beliefs as one of Jehovah's Witnesses.

It is arbitrary and capricious for the hearing officer to reject all the undisputed evidence purely because petitioner was a late-comer to Jehovah's Witnesses. Religions of all denominations are constantly acquiring new converts and losing old worshipers. There is a constant turnover of membership among the various religions. This is going on in time of war as well as in time of peace. Since the practice is not criticized and the change of religions is not evidence of bad faith in time of peace, then by force of the same reason a change of religions from a nonpacifist group to a religion believing in conscientious objection is valid and lawful. This change cannot be held to be *per se* fraudulent or in bad faith.

This proposition has been more extensively argued in the brief for petitioner in the companion case of *Gonzales* v. *United States,* No. 69, October Term, 1954, at pages 41 to 51, to which the Court is here referred.

In its opinion (213 F. 2d 901, 902) the court below admits that Congress afforded greater strength to freedom of conscience than to universal participation in the armed forces; yet the entire opinion runs counter to this admission of the congressional intent. It admits the exemption but then does everything within its power to water it down and make it impossible to protect the conscientious objector status in the courts.

The court below states (213 F. 2d, at p. 903): "The

teachings applicable to the general field of administrative law are of little aid in judicial review of orders issued by selective service agencies." It is true, of course, that the scope of judicial review is greatly restricted in selective service cases as far as classification is concerned. In other words, there is a "no basis in fact" rule rather than the "substantial evidence" rule or the "greater weight of evidence" rule found in other administrative agency decisions. That is admitted.

There is a great difference between the scope of review for the purpose of upsetting a determination by a draft board and the determination of some other administrative agency. The scope of review permitted in draft cases is limited to that allowed in deportation cases. (See the cases cited in footnote 14 of the *Estep* case, 327 U.S. 114, 123 (1946).) Notwithstanding this limitation placed on the judicial review of a determination, the fact remains that procedural due process of law must be strictly adhered to. In fact, the rule is stated in *N. L. R. B.* v. *Cherry Cotton Mills*, 5th Cir., 1938, 98 F. 2d 444, 446, as well as many other cases, that where the scope of review is very narrow and restricted, then the need for an insistence on strict compliance with the procedural regulations must be followed even in draft cases. (See *Ver Mehren* v. *Sirmyer*, 8th Cir., 1929, 36 F. 2d 876, 881, and *United States* v. *Zieber*, 3rd Cir., 1947, 161 F. 2d 90, 92.) These cases hold that there must be a full and strict compliance with the procedural regulations. There are many other cases involving procedural violations that prove this rule.

The court below has obviously confused the difference between the scope of review in the matter of determining the classification or in reviewing the administrative agency determination with that of procedural due process of law. It uses illegally the limited scope of judicial review applicable to a review of classification and applies the same rule to say whether procedural rights have been violated. At 213 F. 2d 901, 903, the court below states: " . . . the

burden is on the claimant to prove himself to be within the group entitled to claim the privilege." The way it discusses this burden it makes it impossible for any registrant who claims to be a conscientious objector to be ever classified as such. It not only puts the burden on the registrant to prove his case but goes a step farther and puts a much greater burden upon the registrant. It is to convince the members of the board that he is entitled to the classification. The court below holds that if he fails to convince the members of the local board or the appeal board of his right to the classification he has not discharged his burden of proof.

The court below says that the courts *may not weigh the evidence.* (213 F. 2d, 903) It has confused and obviously stretched the rule of not weighing evidence out of its proper setting. There is no *weighing* of the evidence unless there is some *conflict* in the evidence. Where there is no conflict in the evidence (and this would include a conscientious objector case) it cannot be said that courts are called upon to weigh the evidence in prosecutions under the act.

The plain answer to all this argument made by the court below is that when a party before an administrative agency has discharged his burden of proof, then the burden shifts. It passes to the other side. One party in a draft case is the registrant. The other party is the Government. The Government has supplied certain forms calling for certain answers. These answers are designated by series and are designed to determine whether a registrant meets the requirements of the statute for exemption or deferment. If a registrant (1) properly and fully answers the questionnaire and the conscientious objector form, (2) shows that he meets the requirements of the statute and (3) this evidence is not impeached or contradicted, he has met the requirements of the statute and regulations. Such registrant has then and there discharged his burden of proof before the administrative agency. When he has done that the burden shifts to the Government. Unless the Government

has some evidence to contradict his statements or until the draft board itself makes a positive finding that it disbelieves the registrant, it cannot be said that there is any basis in fact for a denial of the conscientious objector claim. In such a situation it cannot be said that the registrant has failed to discharge his burden of proof.—*Annett* v. *United States*, 10th Cir., 1953, 205 F. 2d 689, 690-691; *Kulick* v. *Kennedy*, 2d Cir., 1946, 157 F. 2d 811, 814-815.

Nowhere in its opinion does the court below attempt to give any reason why the rule of the *Dickinson* case (346 U. S. 389 (1953)) does not apply in conscientious objector cases. (See 213 F. 2d, at p. 903.) Yet other courts of appeals have held so. Indeed, it specifically disagrees with several other courts of appeals that have held that the rule in the *Dickinson* case does apply.—*Jewell* v. *United States*, 6th Cir., 1953, 208 F. 2d 770, 771-772; *Schuman* v. *United States*, 9th Cir., 1953, 208 F. 2d 801, 802, 804-805; *Pine* v. *United States*, 4th Cir., 1954, 212 F. 2d 93, 96; *Weaver* v. *United States*, 8th Cir., 1954, 210 F. 2d 815, 822-823; *Jessen* v. *United States*, 10th Cir., 1954, 212 F. 2d 897, 900; *United States* v. *Hartman*, 2d Cir., 1954, 209 F. 2d 366, 368, 369-370; see also *United States* v. *Pekarski*, 2d Cir., 1953, 207 F. 2d 930, 931; *Taffs* v. *United States*, 8th Cir., 1953, 208 F. 2d 329, 331-332; *cf. United States* v. *Close*, 7th Cir., 1954, 215 F. 2d 439, 441-442; *United States* v. *Wilson*, 7th Cir., 1954, 215 F. 2d 443, 446.

At page 904 of 213 F. 2d, the court below makes a review of the *Dickinson* holding. (346 U. S. 389 (1953)) The purpose of its review is to show that in the case of the ministerial claim there is a " . . . factual question susceptible of exact proof by evidence as to his status within the sect and his daily activities." It then, by contrast, states that there cannot be a search of conscience. It says that this is because "conscientiously" is a term that is entirely subjective. This is a factitious conclusion. It is a very specious argument that flies directly into the face of the facts. The Government has certain forms that call for answers

and the evidence presented is the basis for determining whether a registrant meets the statutory requirements. The registrant in answering the questions shows whether he fits the statute.

Also, there is the extensive FBI investigation as required by Section 6(j) of the act. There is the hearing before the hearing officer of the Department of Justice. This results in a determination and recommendation as to whether the registrant is a hypocrite or is lying and has done things that are inconsistent with his conscientious objector claim. A bald and sophisticated conclusion is reached by the court at the outset. This is reached in order to achieve the end that there cannot be any exact determination in a conscientious objector case.

The law makes no distinction whatever, as to the burden of proof, between a conscientious objector and a minister, a congressman or a judge. Had the law intended to put a greater burden in making proof upon the conscientious objector it would have been so stated. Congress did not state it. The President and the Selective Service Regulations did not state it. When the conscientious objector form shows, therefore, that a conscientious objector fits the statute and also the FBI report fails to come forward with any contradictory evidence, it must be concluded that there is no basis in fact for the denial of the conscientious objector status.

Therefore, it is plain that the effort of the court below to make distinction of the *Dickinson* case (346 U. S. 389 (1953)) is absolutely wrong. It flies into the face of everything that is fair and reasonable. If this conclusion is right then it will never be possible for any conscientious objector to contend that there is no basis in fact for denial of his conscientious objector claim, regardless of what the facts may be.

The court below talks about the board being able to judge the credibility and demeanor of the conscientious objector in a personal appearance. (213 F. 2d, p. 904) This

is true in the case of all registrants. It is not confined to a conscientious objector. The local board has the right to judge the credibility. However, unless the local board determines and writes into the record that the registrant is lying it must be assumed that his statements are true. (*Annett* v. *United States*, 10th Cir., 1953, 205 F. 2d 689, 690-691; *Kulick* v. *Kennedy*, 2d Cir., 1946, 157 F. 2d 811, 814-815) Then there is no question as to his credibility on the factual statements in his answers. This applies in the case of conscientious objectors as well as in the case of ministers, congressmen or any other registrants.

The argument that the local board has the opportunity to judge credibility (213 F. 2d, p. 904) goes out the window when it is considered that the final and last classification was that of the appeal board. The appeal board did not have the opportunity to interview the registrant. Unless the Department of Justice has reported that it turned up evidence of lying or unless the local board has made a memorandum in the draft board file that it disputes and denies the credibility of the registrant who is claiming to be a conscientious objector, it must be said that there is no challenge in the administrative agency as to the veracity of the claimant.

The fallacy of the process employed by the court below in reaching a basis in fact for the denial of the conscientious objector status is demonstrated by a note in 102 University of Pennsylvania Law Review 694, 697 (March, 1954):

> "If the board were permitted to base a denial of exemption on unexplained disbelief of the testimony presented to it, judicial review would be ineffective to enforce the statutory exemptions and protect the individual registrant. The most arbitrary denial would be indistinguishable on the record from any other action of the board and "no basis in fact" would become *an empty protection if satisfied by demeanor evidence.* Where a *prima*

> *facie* case for exemption has been made, any additional burden which the requirement of affirmative evidence places upon the local board is a burden which the board should be expected to shoulder. In view of considerations of due process existent in all cases, and of personal liberty and freedom of religious beliefs particularly involved in ministerial and conscientious objector cases, the requirement of some affirmative evidence in support of the classification seems to be the minimum requirement consonant with judicial protection of registrants from unwarranted refusals to grant the exemptions provided by the Act." —Emphasis added.

The court below contends that the conscientious objector claim "admits of no such exact proof" and that "probing a man's conscience is, at best, a speculative venture." Read its discussion at 213 F. 2d, p. 904. This is wrong. Also erroneous is the statement about credibility and demeanor, heretofore discussed.

The word "conscientiously" used in the statute is not a vague and indefinite dragnet. The use of this word does not give unlimited and unreviewable authority in the administrative agency. The word "conscientiously" merely means that an action is taken sincerely. The word "sincere" means that a man is not a hypocrite and is not lying in his claim. It means he is true and honest. It must be concluded that a man is not a hypocrite and is not lying and is sincere as long as his answers bring him within the provisions of the statute and the draft board has not stated expressly that it did not believe the registrant.

Even an adverse recommendation by the hearing officer does not, in every case, mean that the believability of the registrant is questioned. The hearing officers of the Department of Justice make written reports to the Assistant Attorney General in Washington. In the recommendations of the Department of Justice to the appeal boards it will

be always stated by the Assistant Attorney General whether the credibility of the registrant is doubted. If he does not expressly state that the conscientious objector is lying then it must be said that the recommendation was limited to the reasons expressly stated in the report. In each case where denial of a claim is recommended the reports usually have been that the registrant's training has been too recent, or that he believes in self-defense or theocratic warfare, or is willing to work in a defense plant, or to work on a farm or do some other work that contributes to the war effort. It is said that these justify the denial of the conscientious objector claim. Such adverse recommendation, based as it is on expressed grounds, would not amount to a challenge of the believability and credibility of the conscientious objector. There must be an expressed challenge of the believability. Purely because the Department of Justice recommends against the claim does not mean that the credibilty of the registrant has been challenged, unless the credibility is expressly attacked.

The statement by the court below (213 F. 2d, p. 905), that it is necessary to "determine subjectively" the conscientious objection, is absolutely wrong. It is erroneous to assume that Congress entered into a field and dealt with it in such manner that it requires a practitioner of the occult science, a fortuneteller or a mind reader before such conclusion could be reached. This opinion by the court below leaves this field of law in a state of confusion and guesswork. Every man's guess is as good as that of another, the court below says. It becomes purely a matter of speculation and not a matter of exact determination. Congress did not treat it as such. The Selective Service System does not. The forms in the Selective Service System call for answers that determine whether a registrant fits the statutory requirements. The Department of Justice investigating procedure and its report pursuant to Section 6(j) of the act and the files of the local board are enough to show that it is not a subjective matter.

It is argued by the court below (213 F. 2d, p. 905) that there would be "mass conversion of males" if its conclusion is not sustained. This is entirely erroneous. It then talks about the temptation being ever present to make the members of any sect claiming conscientious objection a group of evaders. This is merely scare-talk. It has no basis in fact and nothing to do with reality. This argument could be made against any exemption that is permitted in the law. It is out of place in judicial proceedings. It would sound better if made in Congress or on the hustings. Congress rejected it by making each exemption and deferment.

There is a plain difference between avoiding military service by a proper exemption or deferment provided by law and evading military service. It is legal to *avoid* it by proper classification and illegal to *evade* by false statements and other such illegal methods. Yet the court below puts all in the same basket!

When a registrant makes a false statement he can be prosecuted for telling the draft board a lie. This is the better remedy than stretching the basis-in-fact rule so far as to break it and make it impossible for a conscientious objector case to be reviewed in the courts.

The court states (213 F. 2d, p. 905): "We could, under such circumstances, impose on the board the burden of making a record to support its order." It does not state the circumstances. Seemingly it would never be possible, under the circumstances termed "such circumstances," for a court to command a draft board to make a record to support its order. The court seemingly is confining this rule to the *Dickinson* case as to the ministry exemption and other classifications. But it excludes it from the conscientious objector. Why? Whatever be its purpose, it is wrong. A draft board must make a record in every case. There is no exception to this rule in the case of any registrant's claim that is denied. This rule is expressed in the *Dickinson* case.—346 U. S. 389 (1953).

The court below (213 F. 2d, p. 905) says that the *Dickinson* opinion ". . . does not impose on the boards the burden of rebutting every claim made irrespective of the proof offered by the applicant." It then states that if that were done it would convert a privilege into a right. This is very factitious and a false type of reasoning. The privilege granted by Congress must be protected and procedural due process of law must be complied with in "privilege" cases as well as "right" cases. To say that a registrant is entitled to have a fair hearing but that due process of law can be violated (by allowing a draft board to make a determination that flies in the teeth of the evidence by speculation and other type of guesswork) is a rank surrender of judicial responsibility. The *Dickinson* decision (346 U. S. 389 (1953)) (contrary to the court below, according to other courts of appeals and the dissenting Justices in the *Dickinson* opinion) does impose " . . . on the boards the burden of rebutting every claim made . . . " when there is proof offered by the registrant that he fits the statutory requirements for exemption or deferment.

The court below (213 F. 2d, pp. 905-906) discusses the facts in this case. After all the talk it winds up with only one basis for the denial of the conscientious objector status. It is that the petitioner was a late-comer to Jehovah's Witnesses It then (213 F. 2d, pp. 906-907) states that " . . . the length of time elapsing since one has espoused a faith, standing alone, will not furnish a decisive basis for denying conscientious objector status." The court, however, then proceeds to rely on the late-comer argument primarily as basis in fact for the denial of the classification. This is an inconsistent argument at its best. It fails to point out any other factor whatever in the file (except the illegal FBI report) that would justify the denial of the conscientious objector status.

The court next states (213 F. 2d, p. 906) that the local board should not be deprived of " . . . any valid inference in ruling on classification questions." No circumstances are

cited that justify any inference that Simmons was telling a lie. The Department of Justice in its report to the appeal board did not say that Simmons was lying.

The court then speaks of certain negative circumstances relied upon by the Government. But after all is said and done, this argument comes back to the fact that Simmons was a late-comer. The FBI report is referred to. The court then states: "No other members of the sect appeared in his behalf." (213 F. 2d p. 906) However, this is an argument that the draft boards did not raise. Unless the Selective Service System has questioned the failure of others to ap statements and h asserted that no others supported the claim, how can t' ourt below speculate and say this was the basis in fact d upon by the local board or the appeal board?

Now comes the real basis for the denial of the conscientious objector status by the holding that there was basis in fact, according to the court. It states: "Considering his claim *in the light of those of other members of the sect*, as the board was entitled to do, on the evidence of record, we cannot say that its denial of his claim is without basis in fact." (Emphasis added.) (213 F. 2d, p. 906) This quotation shows that the court below was speculating that the board must have known what others of Jehovah's Witnesses have said to other boards in other cases. The court below held in *Hull* v. *Stalter*, 7th Cir., 1945, 151 F. 2d 633, 637, that there could not be a determination of a registrant's classification according to the status of other persons. This rule was established by the court years ago. There cannot be a classification according to class. There must be individual classification and individual determination according to the facts in each registrant's case. The court below ignored this rule in this case.

In one breath the court below states that no other members of the sect appeared in Simmons' behalf. Then in the next breath it says that the board had the right to consider what other members have said in other cases as a basis for

the denial of the conscientious objector status. It does not want to use the other members except for the purpose of driving a spike into Simmons in the case. To sustain thereby illegally the invalid stand, the court has taken that position on the law applicable in this case.

In holding that Simmons was not sincere and that there was basis in fact for the denial of the conscientious objector status the court entirely ignored the report made by the hearing officer of the Department of Justice. It also relied upon the recommendation of the Department of Justice made to the appeal board. That shows, however, that Simmons was a bona fide member of Jehovah's Witnesses. The Department's report fails to state that there was an impeachment or contradiction of the statements he had made in his file showing that he was a conscientious objector. [R. 52-55]

The court turns then to certain "evidentiary factors" reported by the Federal Bureau of Investigation. (213 F. 2d, p. 906) It is the FBI report of Simmons' reputation as being a heavy drinker and gambler. There was no other evidence that Simmons gambled. The report showed that Simmons hung around pool halls before he became one of Jehovah's Witnesses. This informant reported the drastic change in Simmons' life and believed him sincere. [R. 53-54] The court then refers to abusiveness and physical violence toward his wife. The truthfulness of these FBI reports is questioned. The fact remains that the FBI reports do not constitute sufficient evidence to deny the conscientious objector classification in this case. (See *Annett* v. *United States*, 10th Cir., 1953, 205 F. 2d 689, 690-691.) The court refers to the police records turned up by the FBI, but none of this was gone into at the hearing. All of this has been relied upon as a basis for saying that the denial of the conscientious objector status was justified, and it presents the procedural due process argument that will be made later in this brief.

It is respectfully submitted that there was no basis in

fact for the denial of the conscientious objector status.

TWO

Petitioner was denied a full and fair hearing upon his personal appearance before the hearing officer in the Department of Justice when that officer failed and refused to give to petitioner a full and fair summary of the unfavorable evidence in the secret FBI investigative report used by the hearing officer and the Assistant Attorney General in the making of their recommendation under the act.

The undisputed evidence in this case shows that the petitioner upon the occasion of his hearing in the Department of Justice requested to know all the unfavorable evidence in the FBI report. [R. 19] In response the hearing officer referred to only one item of unfavorable evidence. He told petitioner that he had been hanging around pool halls. [R. 19] There was no reference whatever to all the other adverse evidence appearing in the FBI report that was used by the hearing officer and by the Assistant Attorney General in making their recommendations to the appeal board. [R. 19]

The record in this case shows that Simmons did voluntarily request the hearing officer to supply any adverse evidence. The undisputed evidence shows, however, that the hearing officer undertook, by questions that disarmed Simmons, to refer to the adverse evidence appearing in the report. Simmons did not waive the right to have the full and fair résumé.

Simmons did ask for the FBI report. It is true that he did not use the word "résumé" or the word "summary." He asked that he be supplied the unfavorable or adverse evidence. He wanted to know all the evidence that was unfavorable against him. The fact that he may not have used the word "résumé" or "summary" was not enough to defeat his rights to be confronted with the unfavorable evidence. He asked for all the regulations that the Department of Justice would allow at the time.

The Government may place stress upon the fact that the petitioner in this case did not request that he be supplied a summary of the FBI report. To begin with, the Department of Justice procedure forbade the production of any such summary. There was no provision in the Department of Justice regulations for giving a summary. The procedure providing the summary of the FBI report was not established by the Government until on or about September 1, 1953. (See APPENDIX A to this brief, pp. 74.) This was the first time there ever was any procedure authorizing a registrant to get a summary of the FBI report. Since it was impossible for the registrant to obtain a summary of the FBI report from the hearing officer and inasmuch as the Department of Justice regulations prohibited the giving of such summary at the time this case was heard by the hearing officer, the argument of the Government (that the petitioner failed to request a summary) should be rejected.

It should be remembered that the Court held in the *Nugent* case (346 U. S. 1, 6 (1953)) that the registrant was entitled to a summary of the FBI report. The notice sent out to registrants stated they could get the general nature of the unfavorable evidence. Since the notice did not give them the right to have a summary of the evidence (to which the *Nugent* case held they were entitled), failure to comply with the notice sent was not a waiver of the right to insist on a summary of the FBI report.

Regardless of whether the request for the summary of the unfavorable evidence was made it is still the duty of the hearing officer to give the registrant a summary on his own motion. That is positively required now by the regulations of the Department of Justice. The recent amendment to the regulations (requiring a summary of the FBI report to be made for the registrant) is a concession by the Department of Justice that the procedure that it followed before the *Nugent* decision and in this case does not meet the requirement of due process of law and Section

6(j) of the act.—See APPENDIX B to this brief, pp. 75.

The Government argued below that it was not necessary for the hearing officer to supply the registrant with a summary of the FBI report. It is said that *United States* v. *Nugent*, 346 U. S. 1, 6 (1953), does not hold this. The Department of Justice has recognized the effect of the decision in *United States* v. *Nugent, supra,* to require the production of a summary of the FBI report. This is shown by the instructions that have been sent out to registrants since September, 1953, following the decision in the *Nugent* case. (See APPENDIX A and APPENDIX B to this brief, pp. 74, 75.) These new instructions sent by the Department of Justice to the registrants show that it is the policy of the Department of Justice to give the registrants a full and fair summary of the entire FBI report. The summary is not confined to the unfavorable evidence. The exact holding of the *Nugent* case (346 U. S. 1, 6 (1953)) does not go so far as the Department of Justice instructions indicate that it went. At least the holding in the *Nugent* case requires the hearing officer to supply the registrant only ". . . with a fair résumé of any adverse evidence in the investigator's report."—346 U. S. 1, 6.

The report of the hearing officer to the Department of Justice was adverse. Just to what extent he relied on the extensive adverse evidence appearing in the FBI report is not clear. It does appear, however, that there was more adverse evidence in the report than he gave to Simmons at the hearing. Under these circumstances it is clear, therefore, that he failed to give Simmons a full and fair résumé of the adverse evidence appearing in the report. The principle announced by the Court in *United States* v. *Nugent*, 346 U. S. 1, 6 (1953) was not complied with. The contention here that the petitioner was denied a full and fair hearing upon the appearance before the hearing officer is supported by the new regulations of the Department of Justice. These new regulations require that the registrant be supplied with a full and complete summary of the entire FBI

report. It was at least the duty of the hearing officer to supply a summary of all the adverse evidence.—*United States* v. *Bouziden*, W. D. Okla., 1952, 108 F. Supp. 395, 398.

In *United States* v. *Bouziden*, W. D. Okla., 1952, 108 F. Supp. 395, 398, it was held that the registrant was entitled to have a summary of the FBI report produced at the hearing. The court held, however, that the failure of the hearing officer to call the registrant's attention to the substance of the adverse evidence constituted a deprivation of the rights of the registrant.

The court in *United States* v. *Bouziden*, W. D. Okla., 1952, 108 F. Supp. 395, 399, distinguished the decision in *Imboden* v. *United States*, 6th Cir., 1952, 194 F. 2d 508, certiorari denied 343 U. S. 957 (1952), on the ground that the hearing officer provided the registrant in that case with the substance of the unfavorable evidence and that no complaint was made about the failure to answer but that the contention was made that he did not give the names of the informants to the registrant.—Compare *United States* v. *Annett*, W. D. Okla., 1952, 108 F. Supp. 400, 403; reversed on other grounds, 10th Cir., 1953, 205 F. 2d 689.

In *Eagles* v. *Samuels*, 329 U. S. 304, 312-314 (1946) the Court approved the use of the theological panel. The panel made a report that was made a part of the file. It was available to the registrant. It was not withheld to the injury of the registrant as here. The Court, speaking through Mr. Justice Douglas, held that even the information that was received by the special panel and given to the local board, in order to afford due process, had to " . . . be put in writing in the file so that the registrant may examine it, explain or correct it, or deny it. There is, morever, no confidential information that can be kept from the registrant under the regulations."—(329 U. S., p. 313) See also *DeGraw* v. *Toon*, 2d Cir., 1945, 151 F. 2d 778; *Levy* v. *Cain*, 2d Cir., 1945, 149 F. 2d 338; *United States* v. *Balogh*, 2d Cir., 1946, 157 F. 2d 939; judgment vacated, 329 U. S. 692 (1947),

affirmed on other grounds, 2d Cir., 1947, 160 F. 2d 999.

It was long ago held that a person appearing before an administrative agency is entitled to be informed of any adverse evidence that may be used against him. *Chen Hoy Quong* v. *White*, 9th Cir., 1918, 249 F. 869, 870, is one of the first cases decided by the courts on this point. In that case the court held that the failure to disclose a secret and confidential communication relied on by an immigration hearing officer violated the procedural rights to due process of law. The court set aside an order denying an alien admission to the United States on the grounds that he was not given a full and fair hearing.—See also *Bachus* v. *Owe Sam Goon*, 9th Cir., 1916, 235 F. 847, 853; *Chin Ah Yoke* v. *White*, 9th Cir., 1917, 244 F. 940, 942; *Mita* v. *Bonham*, 9th Cir., 1928, 25 F. 2d 11, 12; *Ohara* v. *Berkshire*, 9th Cir., 1935, 76 F. 2d 204, 207; compare *United States* v. *Gray*, 9th Cir., 1953, 207 F. 2d 237, 241-242.

It is unnecessary for the administrative agency to accord a judicial trial as a part of due process. (*United States* v. *Ju Toy*, 198 U. S. 253, 263 (1905)) It is necessary that the procedural steps be otherwise in accordance with the requirements of the Fifth Amendment, guaranteeing notice and the right to defend or answer a charge. (*Interstate Commerce Commission* v. *Louisville and Nashville Railroad Company*, 227 U. S. 88, 91-92 (1913)) The Court has held that where a statute provides for an administrative hearing the due-process clause of the Fifth Amendment requires a full and fair hearing in the sense of the traditional hearing.—*Shields* v. *Utah Idaho Central R. Co.*, 305 U. S. 177, 182 (1938).

Another important case on this subject is *Morgan* v. *United States*, 304 U. S. 1 (1938). That case presented a question on the validity of an order of the Secretary of Agriculture. He fixed maximum rates charged by market agencies under the Packers and Stockyards Act. (7 U. S. C. §§ 181-229) The Court held that a fair hearing commanded an "opportunity to know the claims of the opposing party

and to meet them." Chief Justice Hughes added that the party was entitled to be "fairly advised" and "to be heard" upon the issues. He said that administrative agencies must guarantee "basic concepts of fair play."—304 U. S., at pages 18, 22. See also *Lloyd Sabaudo Societa* v. *Elting*, 287 U. S. 329, 335-336 (1932).

In *Kwock Jan Fat* v. *White*, 253 U. S. 454 (1920) it was held that the suppression or omission of evidence did not allow a fair hearing. It was pointed out that everything relied upon in the administrative determination must be included in the record.—253 U. S., at 464.

In *United States* v. *Abilene & S. Ry. Co.*, 265 U. S. 274, 290 (1924), it was held that a party before an administrative agency must be apprised of all evidence submitted and made a part of the determination.—See also *Interstate Commerce Comm'n* v. *Louisville & N. R. Co.*, 227 U. S. 88, 93 (1913).

The sending of the letter of recommendation by the Department of Justice to the appeal board is after the hearing in the Department of Justice that the registrant attends. Petitioner had no opportunity to see the recommendation of the Department of Justice until after his conscientious objector claim had been denied by the appeal board. The recommendation is sent directly to the appeal board. The registrant never sees this report before the appeal board determination. He has no opportunity to answer the report before the final determination by the appeal board. The making of the report and recommendation to the appeal board, wherein reference is made to the FBI report, does not make the report as available to the registrant as to the appeal board. The petitioner was entitled to have this notice sent to him before the final determination by the appeal board. It is therefore erroneous to conclude that the adverse evidence in the FBI report was made available to the petitioner. It was not made available until it was entirely too late for him to do anything about the appeal board determination.

The petitioner had the right to see his file after the appeal board finished with it and returned its denial of his conscientious objector claims. But this was entirely too late, because there was no chance for the petitioner to get the appeal board to reconsider his classification.

A speculative argument was made by the Government. It was said that the appeal board acted only on the adverse evidence of the FBI report, which is referred to in the report and recommendation of the Department of Justice. The report and recommendation of the Department of Justice to the appeal board never attempts to summarize the FBI report. It merely refers to the FBI report without specifying what part of the report the Department of Justice relies upon. The fact that the appeal board follows the Department of Justice recommendation and denies the conscientious objector status requires the court to speculate as to just what the appeal board did rely upon. Speculation may not be indulged in by the court in a criminal case.--*United States* v. *Alvies*, N. D. Cal. S. D., 1953, 112 F. Supp. 618, 624; *Estep* v. *United States*, 327 U. S. 114, 121-122 (1946).

It was stated by the Government below that the hearing officer discussed fully with the petitioner the unfavorable evidence that appeared in the investigative report of the FBI. This statement is erroneous. There is no support in the record for such statement. This Court, morever, has the responsibility of determining this question. This cannot be settled in this record, because the trial court quashed the subpoena and refused to compel the production of the FBI report to determine whether or not the hearing officer had done what the Government says he did.

It should be remembered that the hearing officer was not called as a witness for the Government at the trial. The failure on the part of the Government to call the hearing officer, to contradict the testimony of the petitioner, gives rise to a presumption that his testimony would have supported petitioner, that he did not give a full and fair

summary of the unfavorable evidence.—*United States* v. *Di Re*, 332 U.S. 581, 593 (1948).

In that part of the opinion by the court below about whether the FBI report should be produced and a full and fair summary of the secret report given to the registrant at the hearing before the hearing officer, the court refers to the case of *United States* v. *Nugent*, 346 U.S. 1 (1953). (213 F. 2d, p. 907) It acknowledges the argument made by Simmons that the *Nugent* decision required that he be given a full and fair summary of all the unfavorable evidence against him. The court below then quotes extensively from the *Nugent* opinion. (213 F. 2d, p. 907-908) It relies heavily upon that part of the *Nugent* opinion where it is stated: ". . . the standards of procedure to which the Department must adhere are simply standards which will enable it to discharge its duty to forward sound advice, as expeditiously as possible, to the appeal board. . . . It is always difficult to devise procedures which will be adequate to do justice in cases where the sincerity of another's religious convictions is the ultimate factual issue."—213 F. 2d, p. 907.

The court below then quotes from the *Nugent* opinion, where it is stated that the Department of Jusice ". . . satisfies its duties under §6(j) when it accords a fair opportunity to the registrant to speak his piece before an impartial hearing officer . . . and at the same time supplies him with a fair résumé of any adverse evidence in the investigator's report." (213 F. 2d, p. 908) But the court below says this quotation is *obiter dictum*.

The issue before the Court in the *Nugent* case was only whether the Department of Justice should have given to the registrant the full FBI report. There was no issue of a full and fair summary raised by Nugent. As an answer to the argument that the full and complete FBI report should be produced, the Government argued that the "fair and just" provisions of the act and due process of law under the Fifth Amendment were complied with when a "full and fair"

summary of the unfavorable evidence was given to the registrant. This Court determined as a fact that in the *Nugent* case there had been a compliance with this minimum requirement.

It is difficult if not impossible to understand how the court below can hold that this is not a part of the holding of this Court. Yet it says that requiring the full and fair résumé of the unfavorable evidence contained in the FBI report is *obiter dictum*. Nevertheless, it should be emphasized that the issue in the *Nugent* case was whether (1) the entire FBI report should have been given to the registrant or (2) only a full and fair summary of it. This Court held that a full and fair résumé was the answer to the contention made by Nugent and Packer. Their contention was that they had been deprived of due process of law and of a full and fair hearing when they were not supplied the full FBI report. It is plain, therefore, that the court below is in error when it says that the quotation above, made from the *Nugent* case, is *obiter dictum*. It was the very basis of the entire opinion.

The court below says that the issue before this Court in the *Nugent* case was the question of whether or not the withholding of the secret FBI report was constitutional. That, of course, was one of the arguments, but it was only one. Do not overlook the fact that another argument was made. It was that the act of Congress and the "fair and just" provisions of the act, as well as the regulations themselves, contemplated (when properly construed) that the FBI report should be supplied to the registrant upon the hearing within the Department and before the hearing officer. There was, therefore, a question of congressional intent and statutory structure involved before the constitutional question was reached.

It was also argued (as an alternative) in the *Nugent* case that due process of law under the Fifth Amendment required the full FBI report to be produced. The statement made by the court below (213 F. 2d, p. 908), consequently

is not accurate. There were broader issues involved than the mere constitutionality of the statute and the regulations denying the FBI report to the registrant at the hearing within the Department of Justice. There was a question of statutory construction and of congressional intent involved in the *Nugent* case.

The court says that (in determining whether a full and fair summary should be given) a line must be drawn between "sham" and "litigious proceeding." (213 F. 2d, p. 909) These words came from the *Nugent* opinion. It then states that the *Nugent* opinion calls for minimum safeguards that will afford the registrant due process of law.

It is next stated by the court below that the *Evans* case (D. Conn., 1953, 115 F. Supp. 340) and other cases following it (where the subpoena for the FBI report has been sustained) are erroneous. (213 F. 2d, p. 909) It states that they were on the theory that the courts misinterpreted the *Nugent* opinion calling for a "full and fair summary by the hearing officer." The court says that the conclusion reached in those cases is predicated on error.

The court below argues that it is error to say that the Government has the burden of proving the validity of the classification on which the induction order is based. This is itself an erroneous concept. The Government in a criminal case must prove a *prima facie* case. If there are present in the *prima facie* case irregularities (or the undisputed evidence shows that there is violation of procedural due process regardless of whether the Government has the burden or not) it is immaterial whether the Government has the burden in the administrative proceedings. The court below again expressly states that it cannot agree that the *Nugent* opinion calls for a full summary of the unfavorable evidence ". . . as an absolute criterion for measuring the legality of the Justice Department hearing."—213 F. 2d p. 909.

At 213 F. 2d, p. 909, the court below states a line should be drawn between "sham" and "litigious proceeding." This is

". . . without regard to procedural rules to meet the requirements of basic fairness consistent with the limitation placed on the statutory provision of finality." The court makes a wrong analogy. It says that it is contended that ". . . the government must point to secret evidence to establish any basis in fact for a particular classification. . . ." This statement is erroneous. The error of this argument is that it has never been contended that the secret FBI investigative report may be used at the trial to show basis in fact or no basis in fact. It is fully agreed that the FBI report may not be produced by the Government at a registrant's trial for the purpose of establishing basis in fact.

The only purpose for which the FBI report is relevant at the trial is to determine whether a full and fair summary of the unfavorable evidence was given to the registrant. It has never been contended that the Government must use the FBI report to support the draft board classification upon review at the trial. The FBI report must and can only be used at the hearing that is conducted within the Department of Justice. The only use that can be made of the FBI report at the trial is to determine whether there has been a full and fair summary or an adequate summary of the adverse evidence appearing in the report given to the registrant at the hearing.

The illegal importation of this argument by the court below into this case shows the error that the court below has gotten into by its effort to get away from the requirement of due process of law in judicial proceedings in criminal cases.

The court below does admit that the *Nugent* decision requires that ". . . evidence on which a classification order must find its support must have been called to the registrant's attention during the classification process. (213 F. 2d, p. 909) This is precisely what Judge Hincks said in the *Evans* case, which opinion the court below criticizes in its opinion. The court below rejects the argument of Judge

Hincks in the *Evans* case, D. Conn., 1953, 115 F. Supp. 340. —213 F. 2d, p. 909.

It was contended in the court below in this case that the hearing officer of the Department of Justice did not call to the attention of Simmons the unfavorable evidence on which the classification and induction order find support. The unfavorable evidence appearing in the FBI report that was relied upon by the Department of Justice was not called to Simmons' attention. It seems, therefore, that the court below has agreed with Judge Hincks in an interpretation of the *Nugent* opinion.

The court below holds that the hearing officer complied with the requirements imposed upon him and the Department of Justice by the *Nugent* opinion. It states: "By his own admission, he and his wife were asked questions relating to his abuse of her." (213 F. 2d, p. 910) The court says these questions were "sufficient to inform him of all adverse evidence." Asking of vague, indefinite and general questions by the hearing officer does not constitute a giving of a full and fair résumé of the unfavorable evidence.

After the hearing officer asked the vague and indefinite question of the wife about how Simmons was treating her, he was then again requested by Simmons to tell him all the adverse evidence. [R. 19] Then the hearing officer evaded him by talking about the large law firm with which he was associated and that he personally knew all the Justices of the Supreme Court of the United States. [R. 19] This type of evasion plus the general questions by the hearing officer certainly constitutes the rankest sort of unfairness. It certainly does not come up to even minimum standards of a full and fair summary commanded by the *Nugent* opinion.—*United States* v. *Gray*, 9th Cir., 1953, 207 F. 2d 237, 241-242; compare *White* v. *United States*, 9th Cir., Sept. 14, 1954, — F. 2d — .

The record shows that the hearing officer did not give a full and fair résumé of the unfavorable evidence. His statements at the hearing were evasive and illusive to the re-

quest made. Never did he answer the request that Simmons made to be supplied all the unfavorable evidence. Reliance by the Department of Justice upon the unfavorable evidence appearing in the FBI report in its recommendation to the appeal board shows that Simmons was harmed and injured by the failure of the Department of Justice to supply a summary of the unfavorable evidence.

The notice sent out by the Department of Justice to the registrant states his right to be supplied with a full and fair résumé of the adverse evidence. But was the mere asking of indirect general questions that could not give a résumé equivalent to the giving of a full and fair summary? A summary is a summary. A question is not a summary or a résumé! It is sophistry to the extreme to argue that a general question is equivalent to a full and fair summary of the contents of the unfavorable evidence appearing in the secret FBI report. When the court below states that Simmons was supplied with a full and fair summary by the asking of the question, there is a complete disregard of the record made.—213 F. 2d, p. 910.

The Department of Justice, since the *Nugent* opinion, has sent out notices to registrants (APPENDIX B, pp. 75-76) in which a *complete summary* is attached to the notice. This present policy of the Department of Justice is an interpretation of the *Nugent* opinion showing that a full and fair summary is necessary. The Department of Justice, therefore, in its memorandum to hearing officers, takes a position that is inconsistent with that taken by the court below in this case.

It is respectfully submitted that the failure on the part of the hearing officer to give a full and fair résumé and summary of the adverse evidence appearing in the FBI report denied petitioner due process of law. The denial of the full and fair hearing destroyed the validity of the draft board proceedings. The motion for judgment of acquittal should have been granted. The overruling of the motion

and the conviction of the trial court constitute reversible error.

THREE

The district court committed reversible error when it quashed the subpoena *duces tecum* calling for the production of the secret FBI investigative report and prevented the use of the report at the trial for the purpose of determining whether the hearing officer had given a full and fair summary of the adverse evidence appearing in the secret FBI investigative report.

Upon the trial petitioner subpoenaed the secret FBI investigative report of the FBI. A motion to quash was made by the Government. [R. 3, 5-6] This was sustained. [R. 9-10] At the trial the petitioner was thereby denied the right to have the use of the secret FBI investigative report. See his affidavit in opposition. [R. 6-9] The trial court made no effort whatever to determine whether or not the report was material or relevant. This could have been determined only by compelling the production of it and examining the report at the trial after it was received into the evidence.

The only way that the court can determine whether the summary that was given is adequate is to admit in evidence the FBI report. The only way the trial court could have discharged its responsibility in this case was to have the report produced. The trial court must say whether the summary of the secret FBI report made by the Department of Justice under Section 6(j) of the act is fair and adequate.

It is necessary, therefore, that the FBI report be produced to the court. Unless and until the court sees and examines the FBI report and also unless and until petitioner sees and examines the FBI report and compares it with the summary that should have been made or compares it with the summary made by the Department of Justice to the appeal board, there is no due process.

The trial court could not discharge its judicial function and determine whether the summary required by the Court

in *United States* v. *Nugent*, 346 U. S. 1, 6 (1953), was fair and adequate unless and until the court had actually seen and examined the secret FBI report. In fact, petitioner's rights could not be preserved unless and until he had an opportunity to examine the secret FBI report and compare it with the summary required to be made.

The decision of the Court in *United States* v. *Nugent*, 346 U. S. 1, (1953), dealt only with the contention that the complete FBI report should be produced to the registrant at the hearing in the administrative agency.

The trial court, as a result of the *Nugent* decision, must determine another and different question. It is whether the *Nugent* opinion required the trial court to determine whether a *summary* of the adverse evidence was needed to be given and, if given, was it adequate? The holding in the *Nugent* case required the court to do that in this case. The court cannot discharge the judicial function placed upon it in the *Nugent* case without seeing the FBI report. The report cannot be seen without admitting it into evidence.

Even though the records sought by the petitioner are claimed to be confidential by Department of Justice Order No. 3229 (issued pursuant to 5 U. S. C. Section 22) they must be produced, because such documents are a part of and form the basis of the administrative determination and action supporting the indictment questioned by the registrant.

The only time the privilege of the Department of Justice pursuant to Order No. 3229 has been permitted to override the claim of procedural due process has been in cases where there is a plain showing that the disclosure would endanger the national security.

The Court refused to compel the revealing of evidence that would endanger national security in the case of *Knauff* v. *Shaughnessy*, 338 U. S. 537 (1950). But even in such a case two justices thought that the evidence ought to be revealed. See what Mr. Justice Frankfurter said in his dissent at page 549 and what Mr. Justice Jackson declared in his dissent at pages 551-552.

There is surely no need under the guise of national security to conceal from the courts the contents of an FBI report of a conscientious objector. It is not one that may affect national security. After all, the FBI report of the conscientious objector merely deals with a man's daily conduct, his religious practices and his habits. If a question of security or national interest should ever come up in the report of the FBI concerning a conscientious objector, the Attorney General could show it. Then there would be no difficulty in keeping such matters secret. To deprive a man of valuable evidence that may affect his liberty, on the ground of mere administrative privilege without some good ground for it, is repugnant to free institutions. This was stressed in the concurring opinion of Mr. Justice Frankfurter in the case of *Joint Anti-Fascist Refugee Committee* v. *McGrath,* 341 U. S. 123, 172 (1951). That was the opinion of Mr. Justice Frankfurter under an order of the Attorney General that required appropriate investigation and determination.

Unless the Government can show some legally recognizable ground for refusing to produce the FBI report at the trial in the district court, then the FBI report must be produced at such trial for inspection and use by the petitioner. The reasons why the report of the FBI must be produced have been set forth by the registrant. In opposition to these points the Government argues that Order No. 3229 is sufficient to overcome the requirements of the Constitution, and "fair play." However, Order No. 3229 was issued pursuant to 5 U. S. C. Sec. 22. That statute provides that the order shall not be in contravention of law. It has been shown that the due-process clause of the Fifth Amendment requires production of all material documents at trial. The Constitution requires due process. The due process requires a hearing and an opportunity to be heard. Order 3229, as here applied, is, therefore, in contravention of law.

While the Court has held that Order No. 3229 is valid, it has left open for the courts to decide the extent to which the Attorney General may use that order to deprive a party

of the right to see and use documents. That was decided in *Touhy* v. *Ragen*, 340 U. S. 462, 469 (1951). See what Mr. Justice Frankfurter said in a concurring opinion at page 472.

The Government gives no specific reason why the report is so confidential that it should not be produced, such as saying that the report has information the disclosure of which might affect internal security or might affect the interests of the Government in some specific way. A general privilege or departmental order, without a specific reason given, should not be permitted to deprive a party of valuable evidence to which he is entitled by law. This was expressed in the case of *Bank Line* v. *United States*, 2d Cir., 1947, 163 F. 2d 133, by Judge Clark in a concurring opinion at page 139.

The argument of the Government and the cases relied upon by it that the withholding of the FBI statement is proper and required by Order No. 3229 and 5 U. S. C. §22 have been distinguished in *United States* v. *Andolschek*, 2d Cir., 1944, 142 F. 2d 503.

The competence of the document has been established by sources outside the document itself. Under the act and regulations the FBI report is relied on by the officials of the Selective Service System in making their final classification. This situation makes inapplicable the principle relied on by the Government. (*United States* v. *Krulewitch*, 2d Cir., 1944, 145 F. 2d 76, 79) *United States* v. *Beekman*, 2d Cir., 1946, 155 F. 2d 580, 584, involved a prosecution for violations of the OPA regulations. The trial court quashed the subpoena on a motion by the Government. On appeal the court reversed on account of the error.

In *United States* v. *Cotton Valley Operators Committee*, W. D. La., 1949, 9 F. R. D. 719, the defendants were charged with a violation of the Sherman Act. The defendants moved for discovery under the Rules of Civil Procedure. The Attorney General was ordered to produce all FBI reports and other records relating to the activity of the defendants so

that the trial court could determine whether they were privileged as claimed by the Attorney General. On refusal to produce, the trial court dismissed the Government's action. It appealed to the Supreme Court. The dismissal was affirmed by an equally divided court.—339 U. S. 940 (1950).

In *Bank Line* v. *United States,* 2d Cir., 1947, 163 F. 2d 133, 138, Judge Augustus Hand said:

> "It has been the policy of the American as well as of the English courts to treat the government when appearing as a litigant like any private individual. Any other practice would strike at the personal responsibility of governmental agencies which is at the base of our institutions. The existence of government privileges must be established by the party invoking them and the right of government officers to prevent disclosure of state secrets must be asserted in the same way procedurally as that of a private individual. . . ."

This statement by Judge Hand is in line with what was stated by Mr. Justice Frankfurter concurring in *Joint Anti-Fascist Refugee Committee* v. *McGrath,* 341 U. S. 123 (1951). He said:

> "Nothing has been presented to the Court to indicate that it will be impractical or prejudicial to a concrete public interest to disclose to organizations the nature of the case against them and to permit them to meet it if they can."—341 U. S., 172-173.

The determination of whether the information sought is privileged is not to be made by the Attorney General. That question is to be determined by the courts and not the Department of Justice. In *Zimmerman* v. *Poindexter,* D. Hawaii, 1947, 74 F. Supp. 933, 935, the court said: "But the clear mandate that all executive regulations be 'not inconsistent with law' circumscribes the power of the entity pre-

scribing the regulation under consideration, and operates to make the applicability and enforceability of a specific department regulation a judicial question for ultimate decision by the court."

This point is further supported by the holding in *Griffin* v. *United States,* D. C. Cir., 1950, 183 F. 2d 990, 993.

Attorney General Clark recognized that the question of privilege is one for the courts to decide rather than the Attorney General when he, in his Supplement Number 2, June 6, 1947, among other things, wrote:

> "If questioned the officer or employee should state that the material is at hand and can be submitted to the court for determination as to its materiality in the case and whether in the best public interests the information should be disclosed."

Later, however, the Attorney General instructed all United States Attorneys and all members of the Federal Bureau of Investigation to refuse to produce the FBI statement, even when requested and ordered by the courts. See Order No. 3229 (Revised), dated January 13, 1953, revoking Order No. 3229 (dated May 2, 1939) and Supplements 1, 2, 3 and 4 thereto, dated December 8, 1942, June 6, 1947, May 1, 1952, and August 20, 1952, which allowed the FBI report to be submitted to the courts for a determination of whether it should or should not be produced.

This new policy established by Attorney General McGranery is contrary to the established rule of law announced many years ago by the Court. In considering the claim of privilege against producing documents containing trade secrets it has been held that it is a judicial decision for the court to make. Mr. Justice Holmes in *E. I. duPont de Nemours Powder Co.* v. *Masland,* 244 U. S. 100, 103 (1917) said:

> " . . . if . . . in the opinion of the trial judge, it is or should become necessary to reveal the secrets to others it will rest in the judge's discretion to de-

> termine whether, to whom, and under what precautions the revelation should be made."

The same rule ought to apply in the determination of the privilege urged by the Government.

The courts that have given judicious consideration to the need for the production of the secret FBI investigative report for the purpose of determining whether or not there has been a full and fair summary made of the adverse evidence since the decision of the Court in the case of *United States* v. *Nugent,* 346 U. S. 1 (1953), have uniformly declared that it is necessary that the FBI report be produced at the trial. Motions to quash these subpoenas *duces tecum* by several judges have been denied.—See *United States* v. *Edmiston,* D. Neb., 1954, 118 F. Supp. 238, 240; *United States* v. *Evans,* D. Conn., 1953, 115 F. Supp. 340, 343; *United States* v. *Stull,* No. 5634, Eastern District of Virginia, Richmond Div., Nov. 6, 1953; *United States* v. *Stasevic,* S. D. N. Y., 1953, 117 F. Supp. 371; *United States* v. *Parker,* No. 3651, District of Montana, Butte Div., Dec. 2, 1953; *United States* v. *Brussell,* No. 3650, District of Montana, Butte Div., Nov. 30, 1953; compare *White* v. *United States,* 9th Cir., Sept. 14, 1954, — F. 2d —, following the court below.

The court below talks about congressional intent and makes policy arguments which completely skirt around the real question. This calls to mind Mr. Justice Jackson's remarks in *Securities and Exchange Commission* v. *Chenery Corp.,* 332 U. S. 194, 214 (1947): "Now I realize fully what Mark Twain meant when he said, 'The more you explain it, the more I don't understand it.'" After all the very extensive discussion by the court below it never gets around to answering the point: How can the court decide whether a full and fair summary of the evidence in the FBI report that is adverse was given to the registrant? It could not answer the question without confessing that it was necessary to see the FBI report. Consequently it avoids facing the issue by talking about everything else.

Let us consider the various so-called reasons given by the court below in its opinion for the refusal to produce the FBI report. It is petitioner's submission that the reasons of the court below are not cogent and find no basis in law. At 213 F. 2d, p. 908, the court below cites *United States* v. *Everngam*, D. W. Va., 1951, 102 F. Supp. 128; *Eagles* v. *Samuels*, 329 U. S. 304 (1946); *United States* v. *Balogh*, 2d Cir., 1946, 157 F. 2d 939; *Levy* v. *Cain*, 2d Cir., 1945, 149 F. 2d 338; and *DeGraw* v. *Toon*, 2d Cir., 1945, 151 F. 2d 778. It puts these aside as inapplicable. These are authority for the proposition that procedural due process of law must be complied with in draft board proceedings. They here support the proposition that if a hearing officer refuses to give a full and fair résumé there is a violation of procedural due process of law. They did not involve the FBI subpoena point. The doctrine of these cases supports the point here, that if there has been a violation of procedural due process of law claimed by the registrant the registrant ought to be entitled to prove it in court. And how can he prove it unless he gets the FBI report produced in court so the judge can see whether a full and fair résumé was made?

The court below then (213 F. 2d, p. 909) cites *United States* v. *Bouziden*, W. D. Okla., 1952, 108 F. Supp. 395; and *United States* v. *Evans*, D. Conn., 1953, 115 F. Supp. 340; as well as other cases by the district courts where the production of the FBI report has been sustained. The court overlooks the fact that Judge Wallace compelled the United States to produce the FBI report in the *Bouziden* case, *supra*, and in *United States* v. *Annett*, W. D. Okla., 1952, 108 F. Supp. 400, 404. In one broad sweep the court says that all the other federal judges have reached their conclusions " . . . without analysis or evaluation." (213 F. 2d, p. 909) Those cases, it is said, " . . . merely restate accepted principles of due process in selective service cases." Then the court says that the *Evans* case is " . . . predicated on error in at least two respects." According to the court below these are (1) that the Government has the burden to

prove validity of draft board proceedings and (2) that the *Nugent* case calls for a full and fair résumé.

The court below states (213 F. 2d, p. 909): "If the Government must point to . . . evidence which the registrant has been denied an opportunity to know and rebut, we do not doubt that the proceeding is so lacking in basic fairness as to require that the classification be declared void." The court below then assumes a fact that is not so, when it says that the Government " . . . cannot use the F.B.I. file in a criminal trial." (213 F. 2d, p. 909) The answer is that the Government can use the FBI file in a criminal trial to prove that the hearing officer either did or did not give a full and fair summary of the unfavorable evidence. This is an erroneous statement in the opinion of the court below that has no support in law.—*United States* v. *Andolschek*, 2d Cir., 1944, 142 F. 2d 503, 506; *United States* v. *Krulewitch*, 2d Cir., 1944, 145 F. 2d 76, 78-79.

The court below says the *Nugent* opinion is not to be read " . . . as requiring anything more than that evidence on which a classification order must find its support must have been called to the registrant's attention during the classification process." (213 F. 2d, p. 909) This whole argument goes around in circles. It is an argument in a vacuum. It assumes a fact not true in every case and then by such assumption reaches a false premise. Yet all the time the court keeps admitting that if a registrant is not given an opportunity to answer evidence relied upon there has been a denial of due process. But the court goes on to say: "Applying these principles, we cannot hold that appellant was denied due process of law."—213 F. 2d, p. 909.

This whole argument defeats itself and cannot be understood. The basic error on which the court below reaches its wrong conclusion is: " . . . the record affords a basis in fact for his classification without reference to the Justice Department's report to the appeal board. In view of this fact, we cannot say that the action of the board was arbitrary." (213 F. 2d, p. 909) This is a very specious and

factitious argument. It ignores the due-process problem completely. It jumps away from the procedural due process problem and attempts to hide behind the conclusion reached by the court below, that there has been basis in fact for the denial of the conscientious objector status.

The defect in the above argument can be illustrated best by an analogy. Suppose a defendant is on trial for murder. The trial judge violates his procedural rights. The undisputed evidence shows the defendant is guilty. He appeals and claims in the appellate court there was a deprivation of due process of law on the trial. It could be argued in the appellate court (if the argument of the court below is right) that, because the defendant was admittedly guilty, he was not entitled to procedural due process of law on his trial. That is exactly what the Court of Appeals did in this case. It concluded that, because there was basis in fact for the denial of the conscientious objector status aside from the Department of Justice report and recommendation, the deprivation of procedural due process of law was harmless error.

If this new foreign principle of administrative law that has been grafted onto the law of this land by the court below is accepted, it means an end to reliance on violation of procedural due process of law as basis for destruction of administrative judgments. The opinion is riddled with error when it attempts to evade the necessity to produce the FBI report.

The court then assumes another fact that was never proved in this case. It assumes a factual conclusion that could never have been reached by the courts below without the production of the FBI report. After assuming this conclusion the court holds that it is unnecessary to produce the FBI report. The court says: "Furthermore, it appears that the hearing accorded appellant conformed to those standards of procedure set forth in *Nugent* to enable the Department 'to discharge its duty to forward sound advice to the appeal board.' "—213 F. 2d, p. 909.

The court below admits the contention of petitioner and then says: " . . . the test has still been met." (213 F. 2d, p. 910) It says two types of adverse evidence were in the FBI files. How did the court below know what was in the files without seeing them? The hearing officer in his report relied on two points: one the mistreatment of Simmons' wife, the other, his former drinking. There was nothing in the administrative record to show that such was all the unfavorable evidence. The Department of Justice relied on the entire file, including the secret FBI report. The Attorney General in his recommendation to the appeal board did not say that was all the unfavorable evidence, nor did the hearing officer so say.

The court below (213 F. 2d, p. 910) says that Simmons was questioned about his carousing. It then says: "By his own admission, he and his wife were asked questions relating to his abuse of her." This is not a correct statement. It is unsupported by the record. There is nothing in the record at the trial showing that Simmons beat his wife. Simmons testified: "Mr. West said that he had my file, and also the F.B.I. report concerning my case. He also said in the report it was reported that I was hanging around pool rooms. . . . He asked my wife how she was feeling, and how was I treating her. My wife said 'Fine.' " [R. 19] Nowhere therein did the hearing officer call to Simmons' attention that he had unfavorable evidence of mistreatment of Simmons' wife.

Simmons testified: "I asked him what else was in the report. Mr. West started to tell me then about how long he had been in the law business with some large law firm here in Chicago, and that he knew all of the Justices in the Supreme Court." [R. 19] Now what sort of fair résumé was this?

The court below said that the question asked by West, the hearing officer, of the wife of Simmons about how he was treating her, without identifying any mistreatment, was " . . . sufficient to inform him of all adverse evidence in the file brought to the attention of the classifying agency,

the appeal board." (213 F. 2d, p. 910) This indirect way of informing a registrant of unfavorable parts without informing him of all the adverse evidence is nothing more than a "cat and mouse" treatment of the registrant that was never contemplated by even the lowest grade of due process in administrative agencies.

The whole approach the court below takes to the problem ignores completely the basic proposition that the entire secret FBI report was before the Department of Justice. The recommendation of the Assistant Attorney General may well have been influenced by contents of the secret FBI report not referred to by the hearing officer. The court has no way of knowing what other adverse evidence there was in the report that led the Assistant Attorney General to make his unfavorable recommendation. There may have been other adverse evidence relied upon that was not specified by the hearing officer. This being true, how can it be said that the hearing officer complied with the regulation and gave all the unfavorable evidence? This is an unusually speculative way of deciding a law question.

The question that the court below had before it was whether the FBI report should have been produced at the trial for the purpose of determining *whether there was a fair and complete summary given.* The Court of Appeals reached the conclusion that there was a full and fair summary because the hearing officer did not refer to any other unfavorable evidence and the testimony showed that these two items were slightly touched upon. This is reaching a conclusion without the evidence, the FBI report. The court below reached a speculative conclusion that there was no unfavorable evidence in the file and thereby used that speculative conclusion as an excuse for failing to discharge the judicial function of compelling the production of the FBI report.

The court below says that in any event " . . . the contents of the F.B.I. file were irrelevant to any issue before the trial court and the court did not err in quashing the

subpoena." (213 F. 2d, p. 910) This is an unreasonable way to approach a judicial problem. When the question of quashing the subpoena was before the court there was no evidence whatever before the judge as to what the contents of the draft board file were. No testimony had been taken. In other words, it required the district judge to anticipate what the testimony would be, which is impossible. The question was the error in quashing the subpoena *duces tecum* and refusing to produce the FBI report. The materiality of the FBI report must be conclusively presumed on the motion to quash, because how does the court know what the evidence is going to be? It means that the court must first try the case and then determine whether the subpoena is to be quashed. This is a most complex and scrambled way to deal with orderly judicial process. The court retried the case *de novo* and reached a finding that there was no basis in fact and there was a full and fair summary given and then determined the quashing of the subpoena was not error.

It is beyond the capacity of counsel to comprehend this type of judicial process. It is not in accordance with orderly judicial thinking. It is difficult to understand how the trial court can determine when it quashes the subpoena *duces tecum* what the evidence is going to be on the trial in response to the subpoena. This putting of the cart before the horse is a basic fallacy. It should be destroyed here.

The court below states (213 F. 2d, p. 910): "*United States* v. *Evans*, 115 F. Supp. 340, and the line of cases following it are not persuasive authority for requiring production of the F.B.I. file at trials of this nature, because of the basic fallacies in reasoning on which, as we have previously pointed out, those decisions rest." After reading all the court below has to say on the subject (213 F. 2d, p. 910) this Court will be unable to find one word in the opinion that even tends to approach a demonstra-

tion that there are " . . . basic fallacies in reasoning on which . . . those decisions rest."

The court below builds up a condition intolerable to the Government if the FBI reports are produced by compulsory subpoena. It beats the drums of fear and anxiety for the draft board officials. It says that the drafting of manpower will be bogged down and completely stopped if the FBI reports are produced. The registrant is in court facing prison. He is not headed for the army. The drafting process is ended as far as he is concerned. Nothing could be farther from reality.

The Selective Service Regulations themselves require that all material and documents relied upon in the classification of a registrant must be included in the draft board file. (Section 1623.1) The court below says: "As offensive as may be the thought of the nameless, secret, hidden informer, anonymity of persons interviewed is a virtual necessity in this type of case, if the Department of Justice is to be unfettered in its appointed tasks of investigating claims of conscientious objection and of forwarding sound advice to the appeal boards." (213 F. 2d, p. 910) The plain answer to this great fear of making known the names and addresses of informants is that the court can compel the deletion of the names of informants before the FBI report is produced at the trial. This was done in *United States* v. *Stasevic,* S. D. N. Y., 1953, 117 F. Supp. 371.—See also *United States* v. *Evans,* D. Conn., 1953, 115 F. Supp. 340.

The court below says: "A holding that these files must be disclosed in every case would effectively tie the hands of draft officialdom, a result which we should be hesitant to promote. (213 F. 2d, p. 910) This is a far-fetched, unreasonable, unsupported statement. Just how will due process of law in the courts where it is necessary to have the FBI reports produced " . . . tie the hands of draft officialdom . . . "? The court below asks, in effect: 'Must we risk the raising of an army or must we risk judicial due process of law?' The issue is not so terrifying. No draft board

official has yet ordered the Attorney General not to produce the FBI report. It is the Attorney General who refuses to produce it. There is no draft regulation or order from the Selective Service System that prevents the FBI report from being produced. It is the Attorney General who has brought about this perplexing problem for the court below.

The Department of Justice by its misconduct in withholding the FBI report, aided by the district judge's quashing the subpoena calling for the FBI report, is the cause of the trouble and certainly it must be considered that to allow due process of law in a Selective Service case does not mean a breakdown of the armed forces of the United States.

The court below did not approach the problem with the same fearlessness that Judge Hand in the Second Circuit did in *United States* v. *Andolschek,* 2d Cir., 1944, 142 F. 2d 503, 506; and *United States* v. *Krulewitch,* 2d Cir., 1944, 145 F. 2d 76, 78-79. See *United States* v. *Reynolds,* 345 U. S. 1, 12 (1953). Those cases held that if the Government wanted to keep the FBI reports secret they should not prosecute where the reports become material, as here. And that seems to be a complete answer to the position taken by the Department of Justice in this case.

The Government may argue that it was unnecessary to have the FBI report produced at the trial because Simmons was familiar with the material in the FBI report. All Simmons knew about this was what he learned when he saw the recommendation of the Department of Justice. But this was not at the hearing or before it. It was at the trial, long after he had been denied his claims by the appeal board. This was entirely too late. He should have been given the summary by the hearing officer either at or before the hearing. That he may have gotten some of the information after he had been tried behind his back in the Department of Justice without any notice is no basis for saying that the FBI report should not be produced at the trial.—

Brewer v. *United States*, 4th Cir., 1954, 211 F. 2d 864; *Sheats* v. *United States*, 10th Cir., 1954, 215 F. 2d 746.

The FBI report is said to be immaterial to any issue. This is not so. The materiality is established by *United States* v. *Nugent*, 346 U. S. 1, 6 (1953); and *United States* v. *Evans*, D. Conn., 1953, 115 F. Supp. 340, 343. There was a duty on the trial court to determine whether what was said by the hearing officer to Simmons constituted a full and fair résumé of the unfavorable evidence. Even if the hearing officer mentioned nothing about adverse evidence or said there was none it still would be the duty of the trial court to see for itself whether there was a need to give a summary and to what extent the summary should be made. In *United States* v. *Packer*, 1952, 200 F. 2d 540, 542 (reversed on other grounds at 346 U. S. 1 (1953)) the Court of Appeals for the Second Circuit said: "It is true that in the case at bar the defendant was told that the F.B.I. report was altogether favorable to him. But the correctness of such a representation was, in our opinion, a matter which the defendant was entitled to judge for himself by seeing the original F.B.I. record."

The judicial function of the trial court cannot be determined until the FBI report is produced. It could not be produced, because the subpoena had been quashed. The trial court could not determine, and the Government is not entitled to argue here, that it was not material or admissible unless and until it saw the FBI report. Since the trial court took steps to prevent itself from being able to perform the judicial function by quashing the subpoena the case should be reversed.

How can it be said that the FBI report is not material when the trial court did not even make an inspection *in camera*? What authority does the Government have to assert to this Court that the FBI report is not material, when the document has been kept out of the record? How can this Court decide the question without seeing the FBI report?

Must this Court speculate in favor of the erroneous holding of the court below and the obdurate Government that hides the FBI report from this Court? Is this Court at the mercy of the Government? The mere asking of the questions reverberates the answer to all: No! Yet that is exactly the position the judicial process of the Court is placed in by the ruling of the court below and the position taken by the Government on this issue in this case.

The position taken by the petitioner on this point is sustained by *Gordon* v. *United States*, 344 U. S. 414, 418-420 (1953). In that case Mr. Justice Jackson stated:

> "We think this misconceives the issue. It is unnecessary to decide whether it would have been reversible error for the trial judge to exclude these statements once they had been produced and inspected. For production purposes, it need only appear that the evidence is relevant, competent, and outside of any exclusionary rule; for rarely can the trial judge understandingly exercise his discretion to exclude a document which he has not seen, and no appellate court could rationally say whether the excluding of evidence unknown to the record was error, or if so, was harmless. The question to be answered on an application for an order to produce is one of admissibility under traditional canons of evidence, and not whether exclusion might be overlooked as harmless error." —344 U. S. 414, 420.

While the trial court did not find the FBI report material and mark it for identification the order quashing the subpoena in effect amounted to a finding of materiality by the trial court. For the purpose of determing whether the FBI report was subject to subpoena it must be conclusively presumed that it was material. By quashing the subpoena the trial court made it possible for the FBI report to be produced for an inspection or examination *in camera* as to its materiality. This circumstance results in

a conclusive presumption on the record in this case that it was material. The trial court in quashing the subpoena made it impossible for it to go as far as it was required to go under *United States* v. *Schneiderman*, S. D. Cal., 1952, 106 F. Supp. 731.

The Government may take the position that it was necessary to call the witnesses subpoenaed and demand that the FBI report be produced. It was not necessary to do this. The witnesses were no longer under compulsion to produce the FBI report after the subpoena was quashed. The trial court had ruled the FBI report out. The trial counsel for petitioner was merely complying with the order of the court quashing the subpoena. Had the counsel for the petitioner demanded the FBI report or called the witnesses for this purpose, in the face of the ruling of that trial court previously made quashing the subpoena, it would have been treated perhaps as contempt or, at least, counsel would be subject to censure. Surely counsel is not required to go so far when a subpoena has been quashed. It has never been held that an assignment of error in quashing a subpoena is waived unless the witness is called and the evidence attempted to be obtained. The courts have not stretched the procedural requirements that far.

Any argument made by the Government that the point is not ripe for decision here because petitioner failed to call for the FBI report at the trial and make it part of the record on his appeal should be rejected. The Court can and should take judicial notice of the Order of the Attorney General that was in existence at the time of the trial of this case. It prohibited the United States Attorney from producing the report to the trial court even for inspection *in camera*. See Department of Justice Order No. 3229, revised by the Attorney General on January 13, 1953, revoking previous amendments of the order dated May 2, 1939, December 8, 1942, June 6, 1947, May 1, 1952, and August 20, 1952, which allowed the FBI report to be submitted to the court for a determination of whether the

privilege outweighed the materiality of the document. Since the United States Attorney was under legal compulsion not to produce it to the court for purposes of completing the record, how can it be said that petitioner failed to attempt to get it? Petitioner cannot be required to go through an idle and vain gesture.

Touhy v. *Ragen,* 340 U. S. 462 (1951), is not in point. There the proceeding did not involve the Government as a party or a criminal proceeding. (See note 6 of that opinion, at p. 467.) The specific provisions of the Rules of Criminal Procedure authorizing production of documents were not there involved. The decision involved the validity of Order No. 3229 on its face. (See notes 1 and 2 of the opinion for the order and Supplement No. 2, pp. 463-464.) It is the validity of the order, as construed and applied to the particular facts, with which the Court is here concerned.

The principle which distinguishes the *Touhy* case from this case is well expressed in *Kentucky-Tennessee Light and Power Company* v. *Nashville Coal Company,* W. D. Ky., 1944, 55 F. Supp. 65.

The criminal cases relied upon by the petitioner in this cases (*United States* v. *Andolschek,* 2d Cir., 1944, 142 F. 2d 503, and *United States* v. *Beekman,* 2d Cir., 1946, 155 F. 2d 580) are, like the case at bar, distinguished for the reasons stated by the Court in *United States* v. *Reynolds,* 345 U. S. 1, 12 (1953). Please read the last paragraph of the majority opinion.

It is respectfully submitted that the district court committed reversible error when it quashed the subpoena *duces tecum* calling for the production of the secret FBI investigative report. Petitioner was prevented from even offering the document into evidence at the trial. The document was relevant for the purpose of determining whether the hearing officer gave petitioner a full and fair summary of the unfavorable evidence appearing in the secret FBI investigative report. No legal or justifiable basis exists for the trial court's ruling or the action of the court below

in affirming the order quashing the subpoena. The judgment of the court below should be reversed and the cause remanded to the district court for a new trial because of this error.

FOUR

In the event this Court concludes that the order sustaining the motion to quash in this case is proper and no error was committed, then petitioner requests this Court to reconsider and reverse its ruling in *United States* v. *Nugent*, 346 U. S. 1 (1953).

It is unthinkable that a person can be sent to prison after being tried behind his back in this country. Proceedings in star chamber were outlawed by the federal Constitution. If a registrant cannot see the FBI report and, when he becomes a defendant in criminal prosecution, cannot subpoena the report to determine whether the Department of Justice has done its duty to provide him a fair summary of the unfavorable evidence, then there has been manufactured for use in the federal courts of this country proceedings in star chamber. This deplorable condition is so serious and of such great magnitude that the entire problem should be reconsidered by this Court. See the joint petition for rehearing filed by respondents in *United States* v. *Nugent*, No. 540, October Term, 1952, and *United States* v. *Packer*, No. 573, October Term, 1952. Copy of the petition for rehearing (marked APPENDIX C) accompanies this brief. The petitioner herein does not request the Court to reconsider and overrule *United States* v. *Nugent*, 346 U. S. 1 (1953), in event this Court reverses the holding of the court below (that the subpoena *duces tecum* was properly quashed). Should the Court, however, hold that registrants are not entitled to use the FBI reports upon trials in the district courts where the defendants seek to show that there has been no full and fair summary of the unfavorable evidence, then petitioner requests the Court to reconsider and overrule its holding in *United States* v. *Nugent*, 346 U. S. 1 (1953).

CONCLUSION

This Court should hold (1) the appeal board denied petitioner his conscientious objector status without basis in fact and the classification is therefore arbitrary and capricious, (2) the hearing officer of the Department of Justice failed to make a full résumé and summary of the adverse information appearing in the secret FBI investigative report, (3) the failure to make this full and fair summary denied petitioner his rights guaranteed by the act and regulations, (4) the trial court committed reversible error when it ordered the subpoena *duces tecum* commanding the production of the secret FBI investigative report quashed. The judgment of the court below affirming the judgment of conviction should be reversed and the cause remanded to the district court with directions to grant the motion for judgment of acquittal. This Court should also, because of the importance of the question and even though the trial court is directed to acquit the petitioner, hold that error was committed in quashing the subpoena *duces tecum* commanding the production of the secret FBI investigative report. In event this Court does not order the district court to sustain the motion for judgment of acquittal, the petitioner says that the very least he is entitled to is a new trial in the district court because of the quashing of the subpoena *duces tecum*. In event the judgment of the court below is in all things affirmed, then this Court is requested to set aside the holding by it in *United States* v. *Nugent*, 346 U. S. 1 (1953).

Respectfully submitted,

HAYDEN C. COVINGTON
124 Columbia Heights
Brooklyn 1, New York
Counsel for Petitioner

November, 1954.

APPENDIX A

September 3, 1953

MEMORANDUM FOR HEARING OFFICERS

Your attention is invited to the fact that paragraph five of Addendum No. 1 to the Instructions states that a résumé of the information developed by the inquiry is attached.

The résumé referred to therein will be prepared by this office and sent to Hearing Officers through United States Attorneys in *only* those cases in which investigations have been completed on or after August 17, 1953. Therefore, in those cases in which you *have not received* résumés of investigative reports, you are requested to send to registrants the old form of "Instructions to Registrants Whose Claims for Exemption as Conscientious Objectors Have Been Appealed" which provides that registrants upon request may be advised as to the general nature and character of any evidence in the Hearing Officer's possession which is "unfavorable to, and tends to defeat, the claim of the registrant. . . . "

The new "Notice of Hearing and Instructions to Registrants Whose Claims for Exemption as Conscientious Objectors Have Been Appealed" enclosed herewith should be sent only to those registrants for whose cases résumés have been received by Hearing Officers from the department.

Except as provided above, Memorandum No. 41, together with attachments supersedes all previous instructions issued by the Department with respect to conscientious objector matters.

/s/ T. Oscar Smith

T. Oscar Smith
Special Assistant to the
Attorney General

APPENDIX B

(New Instructions Since July, 1953)

ADDENDUM NO. 1 TO INSTRUCTIONS TO HEARING OFFICERS APPOINTED PURSUANT TO THE UNIVERSAL MILITARY TRAINING AND SERVICE ACT

Notice of Hearing and Instructions to Registrants Whose Claims for Exemption as Conscientious Objectors Have Been Appealed

---

1. Pursuant to the provisions of section 6(j) of the Universal Military Training and Service Act (P.L. 51, 82nd Cong., 1st Session; 50 USC App. 466(j), hereinafter referred to as the Act, and section 1626.25 of the Selective Service Regulations, the Department of Justice will make an inquiry and hold a hearing with respect to the character and good faith of the registrant's objections to training and service under the Act on the ground that the registrant is conscientiously opposed to participation in war in any form. The scope of the hearing is restricted to consideration of the merits of the conscientious objector claim. Consideration of ministerial claims and all other claims is within the exclusive jurisdiction of the Selective Service System.

2. The hearing will be conducted by the undersigned, a Hearing Officer duly designated by the Department of Justice as a Special Assistant to the Attorney General of the United States.

3. It is incumbent upon the registrant to establish that he is entitled to the conscientious objector classification he claims. The registrant has a right to appear at the hearing

and make a full and complete presentation of his claim. The registrant may testify orally and may present witnesses in support of his claim. However, no Government funds are available for the payment of witness fees or travel expenses.

4. The registrant may also submit at the hearing written statements or documents, or certified copies thereof, in support of his claim. Written statements shall be sworn to or affirmed before a notary public or other persons authorized to administer oaths.

5. Attached hereto is a resume of the information developed by the inquiry conducted pursuant to the aforementioned Act. At the hearing the registrant will be entitled to discuss the information contained in the resume and to present witnesses to refute or corroborate such information.

6. The hearing will not be in the nature of a trial or judicial proceeding, but will be informal and non-legalistic. Legal rules of evidence will not apply at the hearing, but reasonable bounds will be maintained as to relevancy and materiality. In addition to his witnesses, the registrant may have an attorney, relative, friend, or other adviser present at the hearing. Such person, whether an attorney or not, will not be permitted to object to questions, or to make any argument concerning the proceeding. In order that the conduct of the hearing may comport with the necessary requirements of dignity, orderliness, and expedition, the Hearing Officer will be the sole judge in the matter of choice of a method of procedure designed to effectuate the desired result.

7. Failure to comply with these instructions may result in the termination of the proceeding.

....., Hearing Officer